SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 307

ISBRANDTSEN-MOLLER CO., INC., APPELLANT,

vs.

THE UNITED STATES OF AMERICA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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82 Closed

DOCKET

Isbrandtsen-Moller Co., Inc.,

-against-

The United States of America, The Department of Commerce of the United States, The Shipping Board Bureau of the Department of Commerce of the United States, Daniel C. Roper, individually and as Secretary of Commerce of the United States, James C. Peacock, individually and as Director of the Shipping Board Bureau of the Department of Commerce of The United States, and Lamar Hardy, individually and as United States Attorney for the Southern District of New York, Defendants.

ATTORNEYS	ABSTRACT OF COSTS	
	To Whom Due	Amount
Davis, Polk, Wardwell, Gardiner & Reed, 15 Broad St.		$5.- 6.-
	"to set aside order of Secty. Comm. re: Seizure of U. S. Shipping Board"	

DATE	CASH ACCOUNT—PLAINTIFF	RECEIVED	DISBURSED
JAN 31 1936	DEPOSIT	10	
MAR 31 1936			5
MAY 29 1936	DEPOSIT	5	

DATE	CASH ACCOUNT—DEFENDANT	RECEIVED	DISBURSED

DATE	FILINGS, PROCEEDINGS, ETC.	No. of WORDS	CLERK'S FEES		Amounts Reported in Emolument Returns
			PLAINTIFF	DEFENDANT	
JAN - 3 1936	Filed Bill, Praecipe & Issued Subpoena (orig. & 1 dupl orig.)		5.-		
JAN - 3 1936	Filed affdt & Notice of Motion for interlocutory injunction - Ret 1/9/36.				
JAN - 7 1936	Filed order to show cause for interlocutory injunction Ret. 1/10/36. - & Marsh. let - Caffey J.				
JAN - 7 1936	Filed Subpoena & Marshal's Return P. S. on Homer S. Cummings				

DATE			FILINGS, PROCEEDINGS, ETC.	No. OF WORDS	CLERK'S F
MONTH	DAY	YEAR			PLAINTIFF
JAN	3	1936	Filed Bill, Praecipe & Issued Subpoena (1 orig. + 1 Dupl orig.)		5—
JAN	3	1936	Filed affdt & Notice of Motion for interlocutory injunction - Ret 1/9/36.		
JAN	7	1936	" Offd. order to show cause for interlocutory injunction Ret. 1/10/36. - Marsh. Ret. - Caffey, J.		
JAN	7	1936	Filed Subpoena & Marshal's Return P. S. on Homer S. Cummings as Atty. Gen. for Thelt. S a. 1/4/36. - P.S on Louis Trimble Jr., solicitor of Dept. Commerce for Daniel C. Roper 1/4/36. P.S. on Louis Trimble, Jr. solicitor for Department of Commerce of U. S. a. 1/4/36. - P.S. on James C. Peacock Director for Shipping Board Bureau Dept. Commerce of U. S. A. 1/4/36. - P.S on James C. Peacock individually as Director for Shipping Board of Dept. of Commerce of U. S. 1/4/36. - (Marsh. des Col.) -		
JAN	20	[illegible]	Order to show cause (not signed) + Memo. Ind: Caffey, J.		
JAN	27	1936	Filed Subpoena & Marshal's Return P. S. on Lamar Hardy individually 1/4/36. - P.S. on Lamar Hardy U. S. atty 1/4/36. -		
FEB	6	1936	Order designating N. B. Chase R. P. Patterson & W. Bondy as judges to hear this case Feb. 15-1936 at 10:30 a.m. Room 506 - Bondy, J.		
FEB	19	1936	Affdt. of Hans Lebrandsen		
APR	8	1936	" Opinion #9746 - Chase, C.J. Bondy + Patterson D. J.J.J. Bill dismissed		
APR	18	1936	" One (1) vol. of testimony		
MAY	22	1936	Final decree denying motion for interlocutory injunction; and dismissing complaint with costs to be taxed - Bondy, J., Patterson J.	U Id.	
MAY	22	1936	" Petition for appeal -		
MAY	22	1936	" Order allowing appeal - Cose, J.		
MAY	22	1936	" Assignment of errors -	A.P.W.G.R	5—
MAY	22	1936	" Citation Ret. 40 days — Cose, J.		
MAY	22	1936	" Praecipe on appeal -		
MAY	25	1936	" Undertaking on appeal - $250.00 U. S. Fid. + Guar. Co.		
"	27	"	" Bill of costs taxed by defts at $30.00		

[fol. 4]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. E-82/92

ISBRANDTSEN-MOLLER CO., INC., Complainant,

against

[THE UNITED STATES OF AMERICA, THE DEPARTMENT OF COMMERCE OF THE UNITED STATES, The Shipping Board Bureau of the Department of Commerce of the United States,] Daniel C. Roper, Individually and as Secretary of Commerce of the United States; James C. Peacock, Individually and as Director of the Shipping Bureau of the Department of Commerce of the United States, and Lamar Hardy, Individually and as United States Attorney for the Southern District of New York, Defendants.

BILL OF COMPLAINT—Filed January 3, 1936

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Your complainant, Isbrandtsen-Moller Co., Inc., for its bill of complaint and petition herein respectfully alleges as follows, that:

For Its First Cause of Action

1. Complainant, Isbrandtsen-Moller Co., Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York, having been incorporated for the purpose, among others, of operating steamships and carrying cargoes in foreign commerce between the United States and foreign countries. Complainant has [fol. 5] its principal office and principal operating office at No. 6 Broadway, in the City, County and Southern District of New York.

2. Defendant Department of Commerce of the United States is an Executive Department of the United States having its offices in the City of Washington, District of Columbia.

3. Defendant Shipping Board Bureau of the Department of Commerce of the United States is a Bureau of the Department of Commerce of the United States having its offices in the Department of Commerce Building in the City of Washington, District of Columbia.

4. Defendant Daniel C. Roper is the Secretary of Commerce of the United States and the head of the defendant Department of Commerce of the United States, and is an executive officer subject to the direction of the President of the United States, performing executive functions.

5. On information and belief, the defendant James C. Peacock is a resident of the City of Washington, District of Columbia, and is Director of the defendant Shipping Board Bureau of the Department of Commerce of the United States, and is Chairman of the Board of Trustees and President of the United States Merchant Fleet Corporation, and as such is a member of the Steamship Conferences or Shipping Combine.

6. Defendant Lamar Hardy, upon information and belief, is a citizen of the State of New York, residing in the City of New York in said State, and is the United States [fol. 6] Attorney for the Southern District of New York.

7. This is a suit in equity of a civil nature, arising under the Constitution and laws of the United States, as is hereinafter more fully set forth, and is a case of actual controversy, and is a suit brought in accordance with Section 31 of the Act of Congress of September 7, 1916, known as the Shipping Act, 1916 (46 U. S. C. §830), and Section 208 of the Judicial Code of the United States (28 U. S. C. §46), and the Act of Congress of October 22, 1913, Chapter 32 (28 U. S. C. §§43, 44, 45 and 47), to suspend, enjoin, set aside or annul an order issued on the 18th day of November, 1935, by the defendant Daniel C. Roper, Secretary of Commerce of the United States, purporting to act on behalf of the defendant Department of Commerce and the defendant Shipping Board Bureau of said Department, as alleged successor of the United States Shipping Board.

8. Suit is brought in this Court by reason of the provision of said Act of Congress of October 22, 1913, Chapter 32, that except in certain cases of which this suit is not one, venue of a suit brought to suspend or set aside

an order of the Interstate Commerce Commission (or an order of the United States Shipping Board by reason of Section 31 of the Shipping Act, 1916 [46 U. S. C. §830]) shall be in the Judicial District "where one of the petitioners in court has either its principal office or its principal operating office" (28 U. S. C. §43).

9. On the 18th day of November, 1935, defendant Daniel C. Roper, as Secretary of Commerce, purporting to exer- [fol. 7] cise the functions of the United States Shipping Board under Section 21 of the Shipping Act, 1916, issued an order reading in full as follows:

"Department of Commerce, Office of the Secretary,
Washington

In the Matter of Filing Rates and Charges by Common Carriers by Water in Foreign Commerce

Order

It appearing, That full and complete information as to the rates and charges for or in connection with the transportation of certain property from continental United States to points in foreign countries by carriers by water in foreign commerce subject to the Shipping Act, 1916, is necessary to the proper administration of the regulatory provisions of said act;

It appearing further, That Isbrandtsen-Moller Company, Inc., is a common carrier by water in foreign commerce subject to the Shipping Act, 1916;

It is ordered, In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916, that Isbrandtsen-Moller Company, Inc., be, and it is hereby, notified and required to file with the Division of Regulation, United States Shipping Board Bureau, of this Department, at its office in Washington, D. C., on or before December 16, 1935, each port-to-port and tran-shipment rate charged and/or collected by it during the period from September 1, 1935, to November 12, 1935, both dates inclusive, for the transportation of property, except cargo loaded and carried in bulk without mark or count, from all points in continental United States of America to all points in foreign countries; indicated plainly as to each such rate, the place from and to which it was charged and/or collected, the effective

date thereof, and the name, in alphabetic order, of each commodity moving thereunder; showing also each terminal or other charge, privilege or facility, granted or allowed, and any rules or regulations which in anywise changed, affected, or determined any part of any such aforesaid rate, or the value of the service rendered to the consignor or consignee;

It is further ordered, That the aforesaid filing be in printed, typewritten, or mimeographed form, personally subscribed by an officer of said Isbrandtsen-Moller Com-
[fol. 8] pany, Inc., who shall specify his title and verify the accuracy and completeness thereof under oath;

It is further ordered, That copy of this order be served upon said Isbrandtsen-Moller Company, Inc.

(Sgd.) Daniel C. Roper, Secretary of Commerce.

November 18, 1935."

10. Thereafter and on the 7th day of December, 1935, the complainant addressed a communication to the defendant Roper as Secretary of Commerce setting out that the true purpose of said order of November 18, 1935, was to obtain information to be made available to complainant's competitors to aid them in their endeavor to drive the complainant out of business, and further setting out that the functions, powers and duties of the United States Shipping Board had never been validly transferred to the defendant Department of Commerce or to the defendant Roper as head of that Department. The complainant asked therefore that the time required for filing data under said order of November 18, 1935, be extended until the close of the next Session of Congress to give the Congress an opportunity to speak regarding the shipping situation, or that the defendant Roper agree that any information filed by the complainant prior to the close of the next Session of Congress should not be made public or disclosed to complainant's competitors, but should be used only for the information of the defendant Department of Commerce.

[fol. 9] 11. Thereafter and on the 16th day of December, 1935, a conference was held in the office of the Secretary of the Department of Commerce, in the City of Washington, in the course of which the complainant requested that said order of November 18, 1935, be withdrawn or that the complainant be assured that information filed there-

under would not be made available to complainant's competitors.

12. On the 18th day of December, 1935, the defendant Roper passed upon and denied the applications of the complainant for administrative relief as set out in paragraphs 10 and 11 above by a communication addressed to the complainant as follows:

"Department of Commerce, Office of the Secretary, Washington

December 18, 1935.

Isbrandtsen-Moller Company, Inc., 26 Broadway, New York, N. Y.

DEAR SIRS:

Reference is made to your letter of December 7, 1935 and to the conference held in this office on December 16, and in particular to your request that the Shipping Board Bureau Order of November 18, 1935, under Section 21 of the Shipping Act, 1916, be withdrawn or that you be assured that information filed thereunder will not be made available to the public.

This whole general subject was thoroughly considered in connection with the Shipping Board Bureau investigation under Section 19 of the Merchant Marine Act, 1920, and I do not find that anything presented in the letter or conference referred to above would justify a conclusion different from that which was then reached. Your request will therefore have to be denied.

Very sincerely, (Signed) Daniel C. Roper, Secretary of Commerce."

[fol. 10] 13. No further avenues of administrative relief are open to the complainant. If the relief prayed for herein is denied, the complainant will have no adequate remedy against the enforcement of said order of November 18, 1935, regardless of the invalidity, illegality and unconstitutionality thereof.

14. The defendants, other than the defendant Hardy, have claimed and asserted to complainant that there has been set up in the Department of Commerce a Bureau

known as the Shipping Board Bureau, and that this subordinate Bureau in an executive department is entitled to exercise the wide powers of control and the discretionary judgment originally committed to the United States Shipping Board of seven nationally representative Commissioners, who were specifically required by Congress to be appointed from different sections of the country, so as to insure proper geographical representation in formulating and regulating the American Shipping policy and in exercising certain regulatory and quasi-judicial powers, and the Commissioners of said Board once they were appointed were not removable by the President excepting for inefficiency, neglect of duty, or misconduct in office. Complainant is advised by its solicitors and believes, and therefore avers that the United States Shipping Board was obviously intended by Congress to be entirely independent of the President and of the various executive departments and to exercise semi-judicial powers like the Interstate Commerce Commission and the Federal Tariff Commission; and that Congress did not intend to authorize and, in fact, has not [fol. 11] authorized, an executive bureau such as the Shipping Board Bureau of the Department of Commerce to exercise discretionary powers over the American shipping industry.

15. The defendant Roper has never been lawfully authorized by any act of Congress, by the Constitution of the United States, or otherwise, to issue said order of November 18, 1935, either as Secretary of Commerce or in any other capacity. Though the defendants assert that said order is a lawful exercise of the regulatory provisions of the Shipping Act, 1916, the regulatory powers entrusted to the United States Shipping Board by said Shipping Act, 1916, have never been validly transferred to the defendants or any of them. Said order of November 18, 1935, was not issued and has never been approved or ratified by the United States Shipping Board as created and empowered by the Shipping Act, 1916, as amended. On information and belief the United States Shipping Board has made no effort to function as such since August 10, 1933, the effective date of Executive Order #6166, promulgated June 10, 1933, whereby the President of the United States without any warrant or authority in law purported to abolish

the United States Shipping Board, an independent body free from executive control.

16. Said order of November 18, 1935, is null and void and of no effect for the further reason that the regulatory powers entrusted to the Shipping Board by the Shipping Act, 1916, in the attempted exercise of which said order was [fol. 12] issued by the defendant Roper, could never be constitutionally exercised by an officer, board, bureau, agency, or department, of the executive branch of the Government by reason of the separation of legislative, judicial and executive powers provided and guaranteed by the Constitution of the United States.

17. On information and belief, the defendants purport to sustain the validity of said order of November 18, 1935, on the ground that the President of the United States did by Executive Order #6166 (5 U. S. C. § 132n.) promulgated June 10, 1933, and effective August 10, 1933, transfer the functions of the United States Shipping Board to the defendant Department of Commerce, pursuant to the authority vested in him by the Executive Department Reorganization Act of 1932 (5 U. S. C. §§ 124 et seq.). The complainant has been informed by its solicitors and verily believes and therefore avers that said Executive Order #6166 was ineffective to vest in the defendant Department of Commerce or in the defendant Roper the power to issue said order of November 18, 1935, for the following reasons, among others:

(a) Said Executive Department Reorganization Act of 1932 did not authorize the transfer of the regulatory or quasi-judicial functions of the United States Shipping Board to the defendant Department of Commerce or the defendant Roper.

(b) If said Executive Department Reorganization Act of 1932 had purported to authorize the transfer of the regulatory or quasi-judicial functions of the United States Ship- [fol. 13] ping Board to a purely executive department or a purely executive officer, such as the defendant Department of Commerce or the defendant Roper, it would be unconstitutional and void as violative of the provisions of the Constitution of the United States separating the powers of the legislative, judicial and executive branches of the Government.

(c) Said Executive Department Reorganization Act of 1932 is unconstitutional and void for the reason, among others, that it attempts to delegate legislative power to the President of the United States without furnishing any adequate declaration of policy or standard of action to guide him in carrying out the dictates of Congress, thereby violating Article I, Section 1 and Article I, Section 8, clause 18 of the Constitution of the United States of America.

(d) Said Executive Order #6166 was null and void and of no effect for the reason that said order was not preceded by and based upon adequate hearings and contained no adequate finding of facts and no adequate statement of the grounds justifying the President's action in issuing the order.

18. As has heretofore been set out, the complainant has exhausted its administrative remedy against the enforce- [fol. 14] ment of said illegal order of November 18, 1935. The sole legal remedy available to the complainant, viz., the defense of a suit brought against the complainant pursuant to the provisions of the Shipping Act, 1916, to enforce said order or to collect penalties for the complainant's failure to comply therewith, is grossly inadequate by reason of the fact that in the event that the validity of said order of November 18, 1935, should be ultimately sustained, complainant would be subjected to penalties in the amount of $100 per day for such period of time, however prolonged, as the defendants might delay in bringing suit and for such further period of time as might be required to defend the suit to a final conclusion. Injunctive relief against the enforcement of said order is the only plain, speedy and adequate remedy available to complainant and is essential to protect the complainant against irreparable damage.

19. Should the complainant attempt to prevent the running of penalties under Section 21 of the Shipping Act, 1916, (46 U. S. C. § 820) by complying with said order of November 18, 1935, the defendants would, on information and belief, disclose and reveal the information filed by the complainant to the complainant's competitors to the serious impairment and possible destruction of complainant's business. Should the complainant be required to run the risk of incurring the heavy penalty of $100 per day prescribed by Section 21 of the Shipping Act, 1916, during the

period required to prosecute this suit to a final hearing, the complainant is informed and verily believes that it would be deprived of that adequate remedy against the enforcement of an unconstitutional, arbitrary and oppressive order guaranteed it by the Due Process Clause of the Fifth [fol. 15] Amendment to the Constitution of the United States.

Wherefore, the complainant prays

(a) That process in due form issue out of and under the seal of this Court, directed to the defendants as required by law, and that due and proper service of such process and of this petition on the defendants, the United States of America, the Department of Commerce of the United States, and the Shipping Board Bureau of the Department of Commerce be forthwith made by filing a copy thereof in the office of the Secretary of Commerce of the United States, and another copy in the Department of Justice of the United States, pursuant to the provisions of Section 209 of the Judicial Code (28 U. S. C. § 45) and that, thereafter, the defendants and each of them, be required on or before a date to be specified in the subpœna or notice or process issued by this Court to appear herein and to answer this petition.

(b) That as soon as practicable this Court convene a special statutory court of three (3) judges as required by the Act of October 22, 1913, Chapter 32 (28 U. S. C. § 47), and that a preliminary injunction be entered herein restraining, enjoining and suspending the operation of said order of the Secretary of Commerce dated November 18, 1935, pending the final hearing and determination of this suit, pursuant to Section 208 of the Judicial Code (28 U. S. C. § 46).

(c) That on the final hearing of this cause the defendants and each of them, and each of their officers, agents, attorneys, and deputies, be permanently enjoined and restrained from enforcing or attempting to enforce said order [fol. 16] dated the 18th day of November, 1935, or in any manner attempting to collect penalties or impose any penalties upon the complainant or any of its officers for failure to comply with said order.

(d) That this Court declare that the said order dated the 18th day of November, 1935, is illegal, unconstitutional and void in the respects and for the reasons set forth in this bill of complaint and petition.

(e) And for such other and further relief as to justice and equity may pertain, and for its costs.

For Its Second Cause of Action

20. The allegations contained in paragraphs numbered 1 to 14, inclusive, 18 and 19 are repeated and realleged with the same force and effect as though here set out in full.

21. On information and belief, though said order of November 18, 1935, was signed by the defendant Roper, said defendant Roper had previously transferred, so far as lay within his power, all his functions and duties in connection with the subject matter of said order to the defendant James C. Peacock; and it was the defendant Peacock who, as Director of the Shipping Board Bureau of the Department of Commerce, purported at and prior to the date of issuance of said order, and ever since has purported, to exercise the functions committed to the United States Shipping Board by the Shipping Act, 1916, as amended.

22. The defendant Peacock was prior to November 18, 1935, and ever since has been Chairman of the Board of [fol. 17] Trustees and President of the United States Merchant Fleet Corporation, which is a private steamship corporation organized under the general corporation laws of the District of Columbia, and which owns or controls steamships which are operated in competition with the steamships of complainant and other steamship operators.

23. On information and belief, the defendant Peacock as President and Chairman of the Board of Trustees of the United States Merchant Fleet Corporation did on November 18, 1935, and ever since has controlled steamships whose operators are members of conferences or groups of steamship companies combined by contract together to fix rates and otherwise further a shipping monopoly solely for the selfish purpose of making greater profits for certain steamship companies, most of which are owned by aliens residing in foreign countries, and most of whose vessels are operated under the flags of foreign countries, and to eliminate

competition by any independent or non-conference steamship company such as complainant.

24. On information and belief, all of the stock of the said Merchant Fleet Corporation is owned by the defendants. Said Corporation did on November 18, 1935, and ever since has owned or controlled steamships operated in competition with complainant's vessels in the same trades, under the direction of the defendant Peacock.

25. The interests and purposes of said Merchant Fleet Corporation, and of the defendant Peacock as President and Chairman of the Board of Trustees of said corporation and as a member of the monopolistic shipping combines or conferences, and of the defendants who are stockholders of said corporation are wholly inconsistent with the proper and impartial exercise of the regulatory and quasi-judicial [fol. 18] functions granted by Congress to the United States Shipping Board, and with the interests of American shippers and exporters generally, and with the interests of independent steamship companies and competitors, and with the public interest of the United States as expressed in the Shipping Act, 1916, and elsewhere in the statutes and laws of Congress.

26. The provisions of the Constitution of the United States providing for a separation of powers between the legislative, judicial and executive branches of the Government and the Due Process Clause of the Fifth Amendment to the Constitution of the United States prohibit the exercise of regulatory or quasi-judicial functions such as were entrusted to the United States Shipping Board by the Shipping Act, 1916, by persons or agencies having the interests and purposes above set out, and therefore render null and void the said order of November 18, 1935.

Wherefore, the complainant prays for the same relief sought under its first cause of action as if the prayers for relief under said first cause of action were here set out in full.

For Its Third Cause of Action,

27. The allegations contained in paragraphs numbered 1 to 14 inclusive, 18 and 19 are repeated and realleged with the same force and effect as though here set out in full.

28. On information and belief, said order of November 18, 1935, was issued not for a public purpose authorized or designated by Congress, but to promote and foster a shipping monopoly of the complainant's competitors, the Conference Lines, which has as its avowed purpose the monopolization of all transportation in the foreign commerce of [fol. 19] the United States; and to promote and foster the use by complainant's competitors, the Conference Lines, of an illegal practice of quoting a rate to a shipper, and then agreeing to give a large rebate of a fixed sum of money from such rate to such shipper if he will agree not to ship any of his goods during the year or season on a vessel not a member of the Conference Lines or shipping monopoly.

29. On information and belief, said order of November 18, 1935, was issued pursuant to a concerted plan of the defendants to compel complainant and any other independent or non-conference carriers to become part of steamship conferences or the shipping monopoly or a contemplated unified system of transportation by all common carriers by water in the foreign commerce of the United States, and was issued at the request of certain of complainant's competitors to compel the complainant, which is an independent, unsubsidized, non-conference line, either to join a conference or shipping monopoly, which it could not lawfully be compelled to join, or else to suffer serious damage to, if not complete destruction of, its business from the disclosure to its competitors, members of said conferences or shipping monopoly, of its private business records and rates charged and commodities moved by it. The complainant is informed and verily believes and therefore alleges that any provision of law purporting to authorize the issuance of said order for said purposes would be a nullity, being violative of the provisions of the Fourth and Fifth Amendments to the Constitution of the United States.

Wherefore, the complainant prays for the same relief sought under its first cause of action as if the prayers for relief under said first cause of action were here set out in full.

For Its Fourth Cause of Action

30. The allegations contained in paragraphs numbered 1 [fol. 20] to 14, inclusive, 18 and 19 are repeated and re-

alleged with the same force and effect as though here set out in full.

31. Upon information and belief, said order of November 18, 1935, is an unjust discrimination against the complainant, contrary to the Due Process Clause of the Fifth Amendment to the Constitution of the United States, for the reason that it requires the complainant to file actual rates charged by it on particular goods between named ports, whereas the only order issued by the defendants to complainant's competitors, the said Conference Lines, requires merely the filing of general rate schedules which are not always adhered to, and which need not be adhered to under any law or government regulation. Moreover, the order of November 18, 1935, issued to the complainant was purportedly issued under Section 21 of the Shipping Act, 1916, violations of which section carry a heavy penalty; whereas the only order issued by the defendants to said competitors of the complainant was not issued under Section 21 or any other section of the Shipping Act, 1916, and carried no penalties for non-observance.

Wherefore, the complainant prays for the same relief sought under its first cause of action as if the prayers for relief under said first cause of action were here set out in full.

For Its Fifth Cause of Action

32. The allegations contained in paragraphs numbered 1 to 14, inclusive, 18 and 19 are repeated and realleged with [fol. 21] the same force and effect as though here set out in full.

33. The steps taken by the complainant in an effort to procure administrative relief against the enforcement of said order of November 18, 1935, were taken with the greatest possible dispatch after said order had come to the attention of the complainant.

34. Immediately upon receipt by the complainant on December 19, 1935, of the defendant Roper's letter of December 18, 1935, set out in full in paragraph 12 above, denying complainant's application for administrative relief, complainant sought the advice of counsel, whereupon the proceedings herein were instituted with the utmost speed consistent with the importance of the matters involved.

35. Complainant in its letter to the defendant Roper of December 7, 1935, offered to deliver to the defendants the data demanded in said order of November 18, 1935, on condition that said data be not revealed to the public or to complainant's competitors. Said order was flatly rejected by the defendant Roper as has been set out in paragraph 12 above.

36. The litigation herein is brought not for purposes of delay or because of any desire on the part of the complainant to obstruct the lawful performance of government functions but because the complainant in good faith believes that said order of November 18, 1935, is illegal, unconstitutional, null and void for the reasons set out above in complainant's first, second, third and fourth causes of action.

[fol. 22] 37. The disclosure of the data demanded by said order of November 18, 1935, to complainant's competitors would result in an immediate, serious injury to and possible destruction of complainant's business and in other irreparable injury to complainant. There is and has been no way in which the complainant could comply with said order and at the same time protect its equitable, legal and constitutional rights.

Wherefore, the complainant prays

(a) that the defendants and each of them, and each of their officers, agents, attorneys and deputies, be temporarily and permanently enjoined and restrained from collecting or imposing or in any manner attempting to collect or impose any penalty or penalties upon the complainant or any of its officers for failure to comply with said order of November 18, 1935, from the date of its issuance until the date of the final determination in these proceedings of the validity and enforcibility of said order;

(b) and for such other and further relief as to justice and equity may pertain and for its costs.

Isbrandtsen-Moller Co., Inc., by Hans J. Isbrandtsen, President. Davis, Polk, Wardwell, Gardiner & Reed, Solicitors for Complainant, by Theodore Kiendl, a Member of that Firm.

[fol. 23] *Duly sworn to by Hans J. Isbrandtsen. Jurat omitted in printing.*

[File endorsement omitted.]

[fols. 24-37] Summons and returns showing service on Homer S. Cummings et al. omitted in printing.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—January 3, 1936.

Upon reading and filing the bill of complaint and petition of Isbrandtsen-Moller Co., Inc., duly verified the 3rd day of January, 1936, and upon the affidavit of Hans Isbrandtsen, verified on the 3rd day of January, 1936, and other good cause appearing therefor,

Now on motion of Davis, Polk, Wardwell, Gardiner & Reed, solicitors for complainant Isbrandtsen-Moller Co., Inc., it is

Ordered that the defendants above named, and each of them, show cause, if any they have, at 10:30 o'clock A. M. on the 10th day of January, 1936, before the above entitled [fol. 39] court at a stated term thereof to be held in the Old Post Office Building, at Broadway and Park Row, Borough of Manhattan, City, County and State of New York, why an interlocutory injunction should not be issued against defendants restraining or suspending and setting aside the operation of the order issued on November 18, 1935, to complainant Isbrandtsen-Moller Co., Inc., by the defendant Daniel C. Roper, Secretary of Commerce, purportedly in pursuance of the powers conferred on the United States Shipping Board by Section 21 of the Shipping Act, 1916, which order was entitled "In the Matter of Filing Rates and Charges by Common carriers by Water in Foreign Commerce" and restraining the defendants, and each of them and each of their officers, agents, attorneys and deputies from in any manner attempting to collect penalties or impose any penalties upon the complainant or any of its officers for failure to comply with said order until the final decree of this court in this cause; and it is further

Ordered that a copy of this order be served on each of the defendants at least five days before the return date of this order to show cause as hereinbefore designated.

Francis G. Caffey.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HANS ISBRANDTSEN

STATE OF NEW YORK,
County of New York, ss:

Hans Isbrandtsen, being duly sworn, deposes and says:

Deponent is the President of Isbrandtsen-Moller Co., Inc., the complainant named in the bill of complaint and petition filed in the above entitled cause.

Deponent has verified the said bill of complaint and petition and incorporates the allegations therein as part of this affidavit, the same as if herein set forth in full.

On the 18th day of November, 1935, defendant Daniel C. Roper, as Secretary of Commerce of the United States purporting to exercise the functions of the United States Shipping Board under Section 21 of the Shipping Act, [fols. 41 & 42] 1916, issued an order to complainant which is copied in full in paragraph 9 of said bill of complaint and petition. Deponent is advised by his solicitors that said order of November 18, 1935, is invalid on the various grounds and facts set forth in said bill of complaint and petition and that complainant should not properly be subjected to the severe penalties of $100 per day since the effective date of said order, namely, December 16, 1935, either under Section 21 of the Shipping Act, 1916, or otherwise. The enforcement of said order of November 18, 1935, and the collection of the said penalties of $100 per day for each and every day since its effective date, December 16, 1935, will cause serious injury to and possible destruction of complainant's business by divulging to complainant's competitors trade and rate data in connection with complainant's business and for other reasons set forth in said bill of complaint and petition and will cause irreparable injury to complainant.

Hans Isbrandtsen.

Sworn to before me this 3d day of January, 1936. Julius J. —— [illegible], Notary Public, Queens County. Queens Co. Clk's No. 1712, Reg. No. 845. N. Y. Co. Clk's No. 170, Reg. No. 6D83. Commission expires March 30, 1936.

[fol. 43] MEMO. ENDORSED ON ORDER TO SHOW CAUSE

"The matter not having been brought on further before me and in the meantime having been brought on before Judge Bondy in the motion part, I assume the application to me has been abandoned. I am therefore sending to the Clerk's office the papers submitted to me.

Francis G. Caffey, U. S. D. J.

January 18, 1936. Filed Jan. 20/36.

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR HEARING BEFORE THREE JUDGES—Filed February 6, 1936

On the order to show cause issued on January 3, 1936, filed herein, and on the affidavit of Hans Isbrandtsen, president of the complainant, verified January 3, 1936, annexed thereto and on file herein, and on reading and filing the bill of complaint and petition herein, and on hearing the application made before me on January 10, 1936, by solicitors for the complainant, that the question of whether a temporary and permanent injunction should issue herein as prayed for in said bill of complaint be heard and determined by a district court of three judges, as required by law, and notice having been given to the defendants and there being no opposition,

[fols. 45 & 46] Ordered that this cause and all the issues and all further proceedings herein, be heard and determined by three judges of whom at least one shall be a circuit judge as required by the Act of Congress of October 22, 1913, chapter 32 (28 U. S. C. § 47) and Section 31 of the Shipping Act, 1916 (46 U. S. C. § 830), as amended or qualified by the Act of Congress of June 30, 1932, chapter 314, as amended (5 U. S. C. § 124 et seq.) and Section 12 of Executive Order No. 6166 promulgated thereunder by the President of the United States on June 10, 1933, and I hereby call to my assistance for a hearing and determining of said cause Honorable Harrie B. Chase, United

States Circuit Judge for the Second Circuit, and Honorable Robert P. Patterson, United States District Judge for the Southern District of New York, and

Ordered that this cause be and hereby is set for hearing on the 15th day of February, 1936, at 10:30 a. m. in Room 506, new United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York.

Wm. Bondy, U. S. D. J.

Notice of settlement is hereby waived.

Lamar Hardy, U. S. Atty.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF CROSS-MOTION TO DISMISS

SIRS:

Please Take Notice that upon the argument of your motion for an interlocutory injunction, the undersigned, appearing on behalf of the defendants The United States of America, Daniel C. Roper, individually and as Secretary of Commerce of the United States, and Lamar Hardy, individually and as United States Attorney for the Southern District of New York, will make a cross motion to dismiss the bill of complaint and petition herein as against the aforesaid defendants for failure to state facts sufficient to constitute a cause of action in equity and for such other [fol. 48] and further relief as may be just and proper.

Dated, New York, N. Y., January 21, 1936.

Yours, etc., Lamar Hardy, United States Attorney for the Southern District of New York, Solicitor for the Aforesaid Defendants, Office and Post Office Address: Foley Square, Borough of Manhattan, City of New York.

To Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Solicitors for Complainant, 15 Broad Street, New York, N. Y.

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

SPECIAL APPEARANCE AND NOTICE OF CROSS-MOTION TO DISMISS

SIRS:

Please Take Notice that upon the argument of your motion for an interlocutory injunction, and upon the annexed affidavit of John F. Davidson, verified the 21st day of January, 1936, the bill of complaint and petition filed herein, and the Marshal's return of service of the writs of subpœna, the undersigned appearing specially and for the sole purpose of this motion on behalf of the defendants The Department of Commerce of the United States, The Shipping Board Bureau of the Department of Commerce of the United States and James C. Peacock, individually and as Director of The Shipping Board Bureau of the Department of Commerce of the United States, will make a cross motion to quash the alleged service of subpœnas in [fol. 50] equity upon the said defendants, to vacate and set aside the returns of the United States Marshal upon the said writs of subpœnas and to dismiss the bill of complaint and petition herein as against the said defendants for want of proper jurisdiction and venue.

Dated, New York, N. Y., January 21, 1936.

Yours, etc., Lamar Hardy, United States Attorney for the Southern District of New York, Appearing Specially and for the Sole Purpose of this Motion on Behalf of the Above Named Defendants, Office and Post Office Address: New United States Court House, Foley Square, Borough of Manhattan, City of New York.

To Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Solicitors for Complainant, 15 Broad Street, New York, N. Y.

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN F. DAVIDSON

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

John F. Davidson, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York and as such am in charge of the above entitled suit.

2. I have examined the docket entries relating to the above entitled case in the office of the Clerk of the United States District Court for the Southern District of New York. It appears from such docket entries that the return of the United States Marshal for the District of Columbia was filed in the office of the Clerk of this District on January 7, 1936; and that such return shows that on January 4, 1936 copies of the subpœna and bill of complaint were [fol. 52] personally served in the District of Columbia on South Trimble, Jr., Solicitor for the Department of Commerce of the United States of America, James C. Peacock, Director for Shipping Board Bureau, Department of Commerce of the United States of America, and on James C. Peacock, individually and as Director for Shipping Board Bureau of the Department of Commerce of the United States of America. Although these subpœnas were issued out of this Court, no service has been made within the Southern District of New York upon The Department of Commerce of the United States, the Shipping Board Bureau of the Department of Commerce of the United States or James C. Peacock, individually and as Director of the Shipping Board Bureau of the Department of Commerce of the United States, the defendants appearing specially herein.

3. Furthermore, the said defendant James C. Peacock has his official residence in the City of Washington in the District of Columbia, and his personal residence in Chevy Chase, Maryland, and not in the Southern District of New York.

4. The reason this affidavit is made by me and not by the aforesaid defendants is because the said defendants are not present within the Southern District of New York.

5. The statements made herein are based upon information, memoranda and communications received in my official capacity from the Department of Commerce, and upon the records in the office of the Clerk of this Court.

Wherefore, it is respectfully prayed that the relief requested be granted since this Court has acquired no jurisdiction over the aforesaid defendants by virtue of the al-
[fol. 53] leged service of subpœnas upon them in the District of Columbia, and since, in view of the residences of the said defendants, this Court has no jurisdiction over any suit brought against any of the said defendants, nor is it in proper venue for such suit.

John F. Davidson.

Sworn to before me this 21st day of January, 1936. Armand Chankalian, Notary Public, New York Co. Clerk's No. 343 Reg. No. 7C494. Commission expires March 30, 1937.

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HANS ISBRANDTSEN

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

Hans Isbrandtsen being first duly sworn, deposes and says:

He is the President of Isbrandtsen-Moller Co., Inc., the complainant in the above entitled suit.

He has verified the complaint in the above entitled suit and incorporates the allegations therein as part of this affidavit the same as if herein set forth in full.

He also incorporates the allegations in his affidavit filed herein dated January 3, 1936 as part of this affidavit the same as if herein set forth in full.

The facts and general position of complainant with respect to the order of November 18, 1935 of the defendant Daniel C. Roper, Secretary of Commerce, and with respect to the activities of that defendant's subordinates or bureaus with respect to complainant have been repeatedly set forth [fol. 55] by complainant and by deponent in the newspapers published generally in the Port of New York and the facts and statements contained in three such public statements made by complainant and by deponent in the newspapers of the Port of New York are incorporated herein as part of this affidavit the same as if herein set forth in full, and true and complete copies thereof are annexed hereto, marked respectively Exhibits A, B and C and made a part hereof.

Harry S. Brown, whose affidavit has been filed herein by defendants, has stated orally to deponent in the presence of witnesses that the demand for the rate information sought by the Shipping Board Bureau from complainant's files, in reality came only from two of complainant's competitors, namely the Black Diamond Line and the Dollar Line, both of whom are members of steamship conferences or combinations actively competing with complainant; and the said Harry S. Brown has further stated in writing that the purpose of the Shipping Board Bureau in investigating the rates and business of non-conference lines was to benefit the conference lines. Deponent has taken the advice of counsel and is informed and believes that Congress has never intended in the Shipping Act of 1916 or otherwise to require independent or non-conference steamship lines to join the so-called conference or shipping monopoly, Congress having intended to leave it as a purely voluntary matter whether or not a steamship line wished to join such a conference, but requiring that if it did join such a conference thereby violating the Sherman Anti-Trust Act, it would be required by Section 15 of the Shipping Act of 1916 to file its rates with the United States Shipping Board or otherwise be subjected to the penalties and prosecutions un- [fol. 56] der the Sherman Anti-Trust Act because of furthering a shipping monopoly.

Deponent has taken the advice of counsel and is informed and believes complainant has a legal right to carry on its business in United States waters as an independent or non-conference steamship line without being compelled by harassment, by a government bureau or otherwise, to join the

conference or shipping monopoly. Deponent believes that the only proper economical and sound method of carrying on the steamship business is to do as complainant has been doing, namely, keep apart from shipping monopolies or conferences and afford to American shippers and exporters such a reliable, regular and economical service as an unsubsidized and efficient steamship line can render so as to enable American goods to reach foreign ports and markets at economical cost of transportation and thereby effectually compete with foreign sellers sending goods competitively to such foreign markets for sale.

Deponent is informed and believes that such schedules of rates as have been filed by other carriers with the Shipping Board have been filed by carriers who are members of a conference or shipping monopoly and are required by Congress by Section 15 of the Shipping Act of 1916 to file such rates as a condition to not being prosecuted under the Sherman Anti-Trust Act. Deponent is informed and believes that Congress by the Shipping Act of 1916 intended that only common carriers in interstate commerce, as distinguished from foreign commerce, should be required to file their rates with the Shipping Board, as is evident from Section 19 of the Shipping Act of 1916. Deponent is in- [fol. 57] formed and believes that neither the Shipping Act of 1916 nor any other act of Congress requires such carriers as have filed their schedules of rates with the Shipping Board as members of a conference or shipping monopoly, to actually observe those rates, or has given the Shipping Board any power to compel them to do so, and deponent is informed and believes that in many instances such schedules of rates are in fact not observed by the conference lines or shipping monopoly, and that Harry S. Brown, whose affidavit has been filed by defendants herein, simply is not sufficiently familiar with the actual practices in the steamship business of said conference lines to make a statement of his own knowledge; and deponent is informed and believes that said Harry S. Brown is merely a subordinate in the Shipping Board Bureau in Washington, and resides and has his office in the City of Washington.

The Order of November 18, 1935 of the defendant Roper is in substance an effort by a competitor of complainant to regulate complainant's business and drive it from business as an independent or non-conference operator and compel

it to join the shipping monopoly or conference as is plainly evident from the affidavit filed herein by Samuel D. Schell, dated January 27, 1936, and from the affidavit of Harry S. Brown filed herein, dated January 25, 1936. The defendants Roper, Secretary of Commerce, and James C. Peacock are actively and directly competing with complainant in the same trades through exercising the functions of the United States Shipping Board Merchant Fleet Corporation (which deponent is informed was organized as a private corporation under the general laws of the District of Columbia for [fol. 58] the purpose of engaging in the steamship business for profit as an operator of merchant steamships), and instances of this appear from several written steamship operation agreements signed by said defendants, and a true and complete copy of one of which is annexed hereto, marked Exhibit D, and made a part hereof.

So far as the purpose of regulating or stabilizing rates is concerned, which is stated at the end of the affidavit of Samuel D. Schell, and which is also stated as the purpose of the Shipping Board Bureau at page 6 of the affidavit of Harry S. Brown filed herein, deponent has taken the advice of counsel and is informed and believes that neither the United States Shipping Board nor the Department of Commerce has ever been authorized by Congress to regulate or stabilize rates in the foreign commerce of the United States, the United States Shipping Board's authority in that respect being expressly restricted in the Shipping Act of 1916, Section 19, to requiring the filing of maximum rates in interstate commerce and being restricted by the inter-coastal act of June, 1933 to requiring the filing of schedules of rates in inter-coastal commerce. The affidavits of Samuel D. Schell and Harry D. Brown filed herein now disclose clearly and definitely that the Order of November 18, 1935 of defendant Roper is a palpable attempt to exercise a power of rate filing and regulation in the foreign commerce of the United States which Congress has repeatedly declined to confer on the United States Shipping Board or its alleged successor. Deponent is informed and believes that until the Order of November 18, 1935 was issued by the defendant Roper, no nation in the history of the world had ever before attempted to regulate freight [fol. 59] rates in foreign commerce from or to such nation, and it is obvious to anyone with experience in the steam-

ship business that such attempt at rate regulation in foreign commerce by one nation would be impossible in practice and would inevitably result in disruption of international shipping by counter rate regulation by each nation against the other.

Hans Isbrandtsen.

Sworn to before me this 18 day of February, 1936. Charles F. McElroy, Notary Public, Kings Co. Certificate filed in N. Y. Co. Kings County Clerk's No. 131. New York County Clerk's No. 143. Term expires March 30, 1937. (Seal.)

(Here follows three photos, side folios 60, 61 and 62)

EXHIBIT "A" TO AFFIDAVIT
REPRINTED FROM
The Journal of Commerce
NEW YORK
MONDAY, JUNE 25, 1934

To the Shipping Public:

The investigation which the Shipping Board has been conducting at the Hotel Commodore seems to have developed largely into a concerted attack upon this company by our competitors. As neither this company nor any of the ships we employ is the beneficiary of any government subsidies or mail contracts, we have neither time nor money to engage in this protracted controversy, which has already lasted for weeks and has involved the examination of a great number of witnesses in New Orleans and on the Pacific Coast as well as in New York. We, therefore, take this means of answering a few of the misleading statements which have been made about us, and advising our friends of the true facts.

Perhaps the most misleading feature of the testimony given at the Hotel Commodore was the effort to give the investigation a national or patriotic aspect. We have been referred to as a "Danish company" which operates with foreign chartered vessels. Incidentally, this company is a New York Corporation, but we mention this fact merely in passing, and do not consider it important. The important fact is that the Conference Lines who attack us are mostly foreign lines. In almost all of the Conferences a majority of the lines, both in number and tonnage, are foreign. This shows the absurdity of suggesting that there is any national interest in stabilizing freight rates at a high level. Such a course would merely place an additional burden on the foreign trade of this country for the benefit primarily of foreign shipowners. We desire to emphasize that the present investigation is not directed at competition between American and foreign shipowners; the differential in operating costs, owing to the higher living standards in this country, has already been dealt with by postal and other subventions designed to put the American shipowner on a parity with his foreign competitors. The present investigation has to do with the competition between the Conference Lines (largely foreign) and their few independent competitors.

The Conference Lines contend that this competition should be eliminated so that rates can be "stabilized." We recognize the need for stabilization from the standpoint of some of the Conference Lines, because only in this way can the American exporter be saddled with the cost of maintaining the great surplus of expensive tonnage which some of the Lines were unwise enough to build during a boom period, and which the acute world depression has rendered economically worthless. Whether the American export trade should assume the burden of this tonnage (including an enormous amount of foreign tonnage) will be for Congress to decide. It is an economic problem which we shall not discuss here. Within the space available to us we can only state briefly our own position, which we desire to bring to the attention of the friends and patrons of our Line throughout the United States:

1. We believe that a steamship line can only be operated permanently and successfully on the basis of careful, skillful, and economical management.
2. We believe the American shipper is entitled to the cheapest transportation which can be supplied on a sound economical basis. We do not believe that an American exporter of machinery, lumber or cotton should have to contribute to the cost of swimming pools and floating night-clubs in which he is not interested. On the contrary we believe that he should be given the continued opportunity of shipping at a low rate, on vessels which can be operated economically and cheaply.
3. We believe that the problem of surplus tonnage is a problem which rests with the shipowners who made the decision to invest in it, and not with the shipping public.
4. We believe that any shipping monopoly is objectionable; and we are confident that the American public will never tolerate a shipping monopoly largely dominated by foreign lines. Our competitors ask that competition be regulated; but it is clear from their testimony that what they really seek is to eliminate competition altogether.
5. If rates are "stabilized" it will mean that the shipping public must pay to all lines the rate at which the least efficient line can be operated; and must pay for the services of a slow vessel of the simplest freighter type a rate at which a competing line can afford to operate an elaborate and expensive ocean liner.
6. We receive no governmental aids or subventions of any character.
7. Our success is not based upon rate-cutting and we do not operate at a loss. We are able to operate profitably at low rates because of careful planning, conservative methods and efficient operation It has been our aim to meet the need for simple and economical service and not to force our customers to pay for an extravagant and expensive service which they do not require.

and foreign shipowners; the differential in operating costs, owing to the higher living standards in this country, has already been dealt with by postal and other subventions designed to put the American shipowner on a parity with his foreign competitors. The present investigation has to do with the competition between the Conference Lines (largely foreign) and their few independent competitors.

The Conference Lines contend that this competition should be eliminated so that rates can be "stabilized." We recognize the need for stabilization from the standpoint of some of the Conference Lines, because only in this way can the American exporter be saddled with the cost of maintaining the great surplus of expensive tonnage which some of the Lines were unwise enough to build during a boom period, and which the acute world depression has rendered economically worthless. Whether the American export trade should assume the burden of this tonnage (including an enormous amount of foreign tonnage) will be for Congress to decide. It is an economic problem which we shall not discuss here. Within the space available to us we can only state briefly our own position, which we desire to bring to the attention of the friends and patrons of our Line throughout the United States.

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6. We receive no governmental aids or subventions of any character.
7. Our success is not based upon rate-cutting and we do not operate at a loss. We are able to operate profitably at low rates because of careful planning, conservative methods and efficient operation It has been our aim to meet the need for simple and economical service and not to force our customers to pay for an extravagant and expensive service which they do not require.
8. We believe that the only solution of the current depression in the shipping business is an increase in international trade. To the extent of our ability we have tried to play our own small part in stimulating foreign trade and we believe that our customers will agree that we have worked with them in seeking out new markets and new channels of trade. We believe that the Conference Lines could employ their great influence to better effect in trying to increase trade rather than in trying to place additional burdens on the small volume of trade which still exists.
9. We believe that competition is still the life of trade. We do not claim the right of dictating to the shippers how they shall arrange their shipments, or the right to tell our competitors how they shall run their business. We concede them entire freedom of action and claim the same privilege ourselves.

Finally, we solicit inquiries in connection with our economical freight service conducted without frills or fancy equipment, and again call to the attention of the public that we cater particularly to the carrying of American goods which, for transportation reasons, or on account of competition of other exporting countries, have difficulties in finding markets abroad. This policy of ours has found particular favor in view of the unsettled and quick-changing commercial conditions the world over. We expect to continue this policy for the future as in the past.

Isbrandtsen-Moller Co., Inc.

17 BATTERY PLACE—NEW YORK

TO FAR EAST TO THE CONTINENT

WORLD WIDE CARRIERS OF FREIGHT

EXHIBIT "B" TO AFFIDAVIT

Repri ed From The Journal of Commerce New York,

Monday, December 28, 1935

To the Shipping Public:

This company has recently been the subject of considerable publicity by reason of our failure to comply with an alleged order of the Department of Commerce requiring us to report to that Department all rates charged and all commodities carried by our line. A brief statement of our position may be of interest to the public.

In 1916 Congress created the United States Shipping Board and gave it certain regulatory and quasi-judicial powers. The Board consisted of seven Commissioners who were specifically required to be appointed from different sections of the country so as to insure proper geographical representation. Once they were appointed, the Commissioners could not be removed by the President excepting for inefficiency or misconduct. The Board was obviously intended to be entirely independent of the President and of the various Executive Departments and to exercise semi-judicial powers like the Interstate Commerce Commission and the Federal Tariff Commission. By the Act of June 30, 1932, the President was given power to reorganize, consolidate or abolish various executive agencies and bureaus in the Executive Department. By an executive order issued on June 10, 1933, the President purported to transfer all the functions of the Shipping Board to the Department of Commerce which is one of the Executive Departments. There has been set up in the Department of Commerce a bureau known as the Shipping Board Bureau, and it is now claimed that this subordinate bureau in an executive department is entitled to exercise the wide powers of control and the discretionary judgment originally committed to the United States Shipping Board of seven nationally representative Commissioners. We do not believe that Congress ever intended to authorize, or in fact has authorized, an executive bureau to exercise discretionary powers over the American shipping industry.

Notwithstanding our conviction that the alleged order is invalid, we should not challenge it on merely technical grounds. We have nothing to conceal from the Shipping Board Bureau and we have offered to supply any data they desire for their own information. We asked only that the details of our business and of our customers' business should not be made available to our competitors, the Conference Lines. The Bureau has declined to accept this condition and has made it clear to us that they propose to give the Conference Lines the benefit of the data which we have been asked to file. Our competitors have been asked by the Board to file their general rate schedules, which seems proper since only by approval of the Board of their agreements, the Conference Lines escape prosecution under the provisions of the anti-trust laws. These general rate schedules of the Conference Lines are not always, and need not be, adhered to by them, whereas we are now ordered to file actual rates charged on particular goods between named ports.

In the North Atlantic trade and the Far East trade, the Conference Lines have almost a complete monopoly. If our company can be brought into line, the Conference Lines will be within sight of their goal, which is a 100% monopoly of American foreign freight service. From their standpoint the existence of an independent line which operates successfully without any aid from any government, is a constant threat and reproach. The Shipping Board Bureau has made no secret of the fact that it supports the Conference Lines and that its influence will be exerted in their favor. We do not question the motives of the Bureau; they are no doubt sincerely convinced that the Conference method of operation is beneficial to the country and that anything which hampers independent competition is commendable. We are not convinced, however, that this view is shared by Congress or by the people of the United States. To us, of course, it must seem strange that the Bureau should be so obviously concerned that independent steamship competition is available to American exporters, while at the same time so unconcerned over the outrageous misuse of huge sums of the taxpayers' money by certain American Conference Lines, with whom we compete, as unearthed in the recent congressional investigation. Highly inconsistent also, that the Conference contract system with its penalties, etc., in the foreign trade is not worthy of the Bureau's attention, but condemned by it in the intercoastal trade. So far as we are aware, no shipper has ever made any complaint of this Line or its methods. The attacks on us have come from our competitors, who constitute one of the greatest monopolies in the world, but who still find it necessary to invoke the aid of the United States Government in order to make sure that no independent ocean carrier can invade the waters of the United States.

It will of course be pointed out that this Line is operated with foreign flag vessels. In answer to that argument we will merely point out that the Conference Lines, both in number and tonnage, are predominantly foreign.

By an executive order issued on June 10, 1933, the President purported to transfer all the functions of the Shipping Board to the Department of Commerce which is one of the Executive Departments. There has been set up in the Department of Commerce a bureau known as the Shipping Board Bureau, and it is now claimed that this subordinate bureau in an executive department is entitled to exercise the wide powers of control and the discretionary judgment originally committed to the United States Shipping Board of seven nationally representative Commissioners. We do not believe that Congress ever intended to authorize, or in fact has authorized, an executive bureau to exercise discretionary powers over the American shipping industry.

Notwithstanding our conviction that the alleged order is invalid, we should not challenge it on merely technical grounds. We have nothing to conceal from the Shipping Board Bureau and we have offered to supply any data they desire for their own information. We asked only that the details of our business and of our customers' business should not be made available to our competitors, the Conference Lines. The Bureau has declined to accept this condition and has made it clear to us that they propose to give the Conference Lines the benefit of the data which we have been asked to file. Our competitors have been asked by the Board to file their general rate schedules, which seems proper since only by approval of the Board of their agreements, the Conference Lines escape prosecution under the provisions of the anti-trust laws. These general rate schedules of the Conference Lines are not always, and need not be, adhered to by them, whereas we are now ordered to file actual rates charged on particular goods between named ports.

In the North Atlantic trade and the Far East trade, the Conference Lines have almost a complete monopoly. If our company can be brought into line, the Conference Lines will be within sight of their goal, which is a 100% monopoly of American foreign freight service. From their standpoint the existence of an independent line which operates successfully without any aid from any government, is a constant threat and reproach. The Shipping Board Bureau has made no secret of the fact that it supports the Conference Lines and that its influence will be exerted in their favor. We do not question the motives of the Bureau; they are no doubt sincerely convinced that the Conference method of operation is beneficial to the country and that anything which hampers independent competition is commendable. We are not convinced, however, that this view is shared by Congress or by the people of the United States. To us, of course, it must seem strange that the Bureau should be so obviously concerned that independent steamship competition is available to American exporters, while at the same time so unconcerned over the outrageous misuse of huge sums of the taxpayers' money by certain American Conference Lines, with whom we compete, as unearthed in the recent congressional investigation. Highly inconsistent also, that the Conference contract system with its penalties, etc., in the foreign trade is not worthy of the Bureau's attention, but condemned by it in the intercoastal trade. So far as we are aware, no shipper has ever made any complaint of this Line or its methods. The attacks on us have come from our competitors, who constitute one of the greatest monopolies in the world, but who still find it necessary to invoke the aid of the United States Government in order to make sure that no independent ocean carrier can invade the waters of the United States.

It will of course be pointed out that this Line is operated with foreign flag vessels. In answer to that argument we will merely point out that the Conference Lines, both in number and tonnage, are predominantly foreign. It is difficult to understand why the powers of the United States Government should be exerted to foster a monopoly which is predominantly foreign and which has as its avowed purpose to monopolize transportation of American foreign commerce. In this connection thoughtful exporters will no doubt bear in mind that many of the foreign steamship companies which operate a service from this country also operate a service to the same foreign markets from their own country. This is a matter which has to be carefully considered before we disclose the details of our own business,—and incidentally the business of our customers, especially in view of the fact that such information is not required to be, nor is made public, or even filed, in any other exporting country competing with American export trade. It is true that we use foreign ships but we are an American company, and we have no other interests excepting in American foreign commerce.

We feel that we have been fighting for a principle which is important to all Americans who have an interest in the foreign commerce of this country. It may be that we are old fashioned and that it is against modern public policy for any concern to succeed by mere industry, economy and efficiency, without any subsidy from the taxpayers. However, we are not yet convinced that this is so. Under these circumstances we believe that American shippers and consignees are entitled to economical and competitive service, and we think they demand that privilege. As for us, we continue to cater to that demand.

Isbrandtsen-Moller Co., Inc.

26 BROADWAY — NEW YORK

TO FAR EAST TO THE CONTINENT

WORLD WIDE CARRIERS OF FREIGHT

OUR POSITION IS:

The Shipping Board Bureau's general attitude, as demonstrated on numerous occasions, is not in accord with the functions of the Department of Commerce. The functions of the Department of Commerce are to promote foreign commerce and to maintain an open international market, by the free and unobstructed movement of goods at economical transportation cost. Further, the Bureau's attitude seems influenced too much by the selfish interest of the steamship combinations to which our competitors in the steamship trade belong and very likely also by the Bureau's own interest in the operation of its ships in combination with others.

Also, we see no reason why we should be required to disclose our private trade information to our competitors (although we were not unwilling that the Department should have it for its own information if it would agree to accept it on that condition); but our reluctance to throw open to the world at large trade data that many of our customers reasonably expect be kept private, certainly is understandable. We take no part in monopoly or combination with others, or what might border thereon. We simply render an honorable, economical transportation service to those exporters and importers who want it, and without coercion of any sort.

The reason why most of our competitors are required to comply with various regulations and restrictions is because Congress, under pain of penalties under the Sherman Anti-Trust Act, forbade their combining together as conferences or shipping monopolies in restraint of competition unless they would agree to certain regulation. The benefits and special privileges they thus obtained at the expense of American shippers were apparently sufficient to persuade them to submit to regulation so as to be permitted to ignore the Anti-Trust Law without fear of prosecution for penalties. Congress made it plain, however, that compulsion was not properly to be used, either by such combining steamship companies or by the Shipping Board, to force an independent steamship company to join such a combination or to observe the practices of combinations or their fixed or frozen rates.

So the fundamental question is whether such maintenance of an open market as we favor, and such rendering of independent steamship service as we render, are to be harassed by a Bureau? If they are, we would like to know it definitely and, of course, must have it from good authority. Our understanding is that up to this time American national shipping policy has always been formulated by Congress or a regulatory and quasi-judicial body, and not by a Bureau head. And that policy heretofore has followed the overwhelming national interest in maintaining the rights of American exporters and shippers generally to have access to the world freight market by maintaining the principle of free competition in transportation service in the foreign trade. Obviously it is only by such a policy that American exporters can succeed in selling and delivering their products in foreign markets in competition with sellers or factories in foreign countries. As is known, our opposition to the rulings of the Bureau has brought with it a questioning of the legal authority of the one man dominating the Bureau to function as a regulatory or quasi-judicial body like the former Shipping Board Commission, a question that was raised by others before we raised it, so there was nothing new about it. The question of who's who would not, of course, be significant to us if true principles of trade and competition were adhered to. But if the latter are stifled, the life is out of business, and we are convinced that the ultimate authority deciding this question will not ignore plain common sense.

We are not interested in controversy, and it is a puzzle to us that the ordinary and every-day position we have taken right along should create such a maze of bureaucratic rulings, and such a wholly unnecessary situation.

Isbrandtsen-Moller Co., Inc.

26 BROADWAY—NEW YORK

TO FAR EAST TO THE CONTINENT

WORLD WIDE CARRIERS OF FREIGHT

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[fol. 63] EXHIBIT "D" TO AFFIDAVIT

Operating Agreement, 1935

This Agreement made on the 4th day of October, 1935, between the United States of America, hereinafter designated as the Owner, represented by the Secretary of Commerce, acting by and through the United States Shipping Board Merchant Fleet Corporation, and Cosmopolitan Shipping Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware, hereinafter designated as the Managing Agent,

Witnesseth:

1. Appointment of Managing Agent.—The Owner hereby appoints the Cosmopolitan Shipping Company, Inc., as its Managing Agent to manage, operate and conduct for and on behalf of the Owner, the business of the Owner's Line, known as the America France Line, operating on berth service between United States Atlantic ports, north of Cape Hatteras (with privilege of calling at Halifax and/or St. John, N. B.), and French Atlantic and French Channel ports, and shall allocate the following vessels:

Collamer
Independence Hall
Pipestone County
Sarcoxie
Schodack

and/or such other vessels as may hereafter be substituted for or added to the said vessels from time to time. The Owner may withdraw at any time from the Managing Agent any vessel or vessels now or hereafter allocated, which in its judgment are not required for the operation of the Line.

2. Acceptance of Appointment.—The Managing Agent hereby accepts said appointment and agrees to act as such Managing Agent and to manage and operate the said vessels and conduct the business of said Line under the authority hereby conferred by the Owner and subject to the terms and conditions herein set forth, and the directions, orders and regulations issued hereunder.

[fol. 64] 3. Managing Agent Must Use Care.—The Managing Agent shall exercise due diligence to protect and safeguard the interests of the Owner in all respects, and to avoid loss and damage of every nature to the Owner.

4. Delivery of Vessels.—The Owner hereby agrees to deliver all vessels under this contract classes A-1 (E) in the American Bureau of Shipping, with proper certificates, and to use due diligence that such vessels at time of delivery shall be seaworthy in every respect.

5. Managing Agent to Man, Supply and Operate.—The Managing Agent further agrees fully to man, equip, victual, supply and operate such vessels, subject to such restrictions and in such manner as the Owner may prescribe, and to certify or approve for payment by the Owner the true cost thereof and all other costs and expenses, except overhead, incident to the management, operations and conduct of business of such vessels as the Owner may from time to time direct. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any of such employees if it shall have reason to be dissatisfied. The vessels shall be manned by crews, obtained so far as practical through the Shipping Service of the Department of Commerce.

6. Maintenance and Repairs.—The Managing Agent shall, subject to such regulation or methods of supervision and inspection as may be required or prescribed by the Owner, exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair covering hull, machinery, boilers, tackle, apparel, furniture, equipment and spare parts, and to effect maintenance and voyage repairs and replacements. No extraordinary repairs or expenses of any kind shall be made by the Managing Agent, except in cases of serious emergency, without first securing in writing the authorization of the Owner.

7. Surveys.—The Owner shall have the right at any time, [fol. 65] without notice, to survey any of the vessels allocated to the Managing Agent, to satisfy itself that they are being properly maintained, and the Managing Agent shall make all such repairs as such survey may determine to be necessary.

8. Control by the Managing Agent.—The Managing Agent shall, as directed by the Owner, collect all monies and shall certify or approve for payment by the Owner, vouchers covering all expenses incident to the management and operation of the Line, the maintenance and operation

of the vessels, and all other business activities pertaining thereto. The Managing Agent shall account to the Owner for all monies collected by it or its subagents or monies disbursed by its subagents.

All business shall be carried on in the name of the said Line, for the account of the Owner.

The Managing Agent shall be responsible to the Owner in all respects for the acts of any agents selected by it, and such agents shall not be in any respect the agents of the Owner, but solely the agents of the said Managing Agent, and shall at any time be subject to disapproval by the Owner. The commission or fees payable to such agents shall be subject to approval by the Owner.

9. Traffic Contracts.—All traffic contracts shall be for the account of the Owner and all documents such as bills of lading, contracts of affreightment, etc., shall be in accordance with the terms, conditions and forms prescribed by the Owner.

10. General Average.—In case of general average, the Managing Agent agrees to appoint an adjuster from the list of adjusters approved by the Owner, and to assist the adjuster in preparing the average account, to take proper security for the cargo's proportion of average, and to assert liens and to take all other possible measures to protect the interests of the vessel and Owner. For such serv-[fol. 66] ices the Managing Agent shall receive the customary fee the amount of which will be determined jointly by the Managing Agent and the adjuster, subject to the approval of the Owner.

11. Accounting and Auditing.—The Managing Agent shall keep separate books of accounts, vouchers and documents in which will be recorded all transactions of every nature covering the operation of the Line, which books, vouchers and documents shall be maintained as prescribed by the Owner and shall be the property of the Owner.

The Corporate Books of the Managing Agent shall be fully and completely maintained, and these books of accounts, together with all vouchers, files and documents, shall be made accessible for examination and audit by representatives of the Owner upon demand. The books and records of foreign and domestic agencies in which the Managing Agent or its officials have financial interests,

together with the books and records of subsidiaries, affiliates, or associates that perform services or furnish supplies for the Line, shall so far as possible be made accessible to the Owner to the extent of determining the profits made from transactions with the Line.

12. Reports.—The Managing Agent shall furnish statements and reports when called for by the Owner and in the form prescribed by the Owner.

13. Insurance.—The Owner shall provide, without cost or expense to the Managing Agent, hull, machinery and port risk insurance and the Managing Agent shall provide, for the account of and subject to the approval of the Owner, — and I. and such other forms of insurance as the Owner may deem necessary.

14. Compensation.—In consideration of the services rendered by the Managing Agent, the Owner hereby agrees to pay said Managing Agent as follows:

(a) The sum of $11,250.00 per calendar month, and pro rata per fraction thereof for overhead provided however, [fol. 67] that for the period beginning with the date on which the first vessel is delivered to the Managing Agent under this agreement and ending with the date on which the last vessel is redelivered to the Owner under that certain agreement known as "Operating Agreement 1930", the payment to the Managing Agent for overhead shall be an amount for each calendar month or fraction thereof as will equal the same percentage ratio of the sum of $11,250.00 as the total vessel days per month under this agreement bears to the total vessel days in the same month under both this agreement and the "Operating Agreement 1930" as amended. Said sum shall be payable on the last day of each month commencing with the month during which the first vessel is delivered to the Managing Agent hereunder;

(b) A sum equivalent to three per cent (3%) of all the gross revenue, as herein defined earned by the Line and collected by the Managing Agent. Said sum shall be payable on the first day of the month on such gross revenue earned by the Line and collected during the preceding month;

(c) A sum equivalent to twenty-five per cent (25%) of the net profits earned by the Line during the period of this agreement or any extension hereof computed as hereinafter provided. Net profits earned by the Line for the period commencing with the effective date of this agreement and ending June 30, 1936, shall be computed for such period unless this agreement is terminated prior thereto, in which event the computation shall be as of date of termination. Net profits earned by the Line during any period of this agreement, or any extension hereof, subsequent to June 30, 1936, shall be computed as of June 30th of each year, or as of date of termination of this agreement or any extension hereof, whichever shall first occur. Said sum or sums shall be payable within thirty (30) days after the Owner computes the net profits earned by the Line for the periods herein set forth.

Net profit shall be computed on terminated voyages and is defined as excess of gross revenues over operating costs. Gross revenues include all revenue from cargo, passengers, mails, salvage and general average fees, dead freight net gain or loss on prepaid-beyond and advance transactions, net receipts or contributions under pooling agreements, and net agency fees received from other Managing Agents of the Owner. Operating costs include agency fees paid, commissions and brokerage, P. and I. insurance premiums, maintenance repairs not exceeding an aggregate amount per year or fraction thereof computed at the rate of Fifteen Hundred Dollars ($1,500.00) per voyage, uncollected revenues or insurance claims or other recoverable expenditures, net gain or loss on slop chest sales, net exchange [fol. 68] gains or losses, cash and trade discount credits, and all other usual costs and miscellaneous gains or losses in the operation of vessels, except marine insurance premiums, maintenance repairs in excess of the aforesaid amount, betterments, depreciation, interest, Managing Agent's commission on gross revenue, overhead payments to Managing Agent, and inactive vessel expense of vessels in lay-up, idle status and/or repaid status, for that part of any continuous period during which such status exists in excess of sixty (60) days.

If at any time after the date of this agreement, the compensation to the Managing Agent, by reason of changed

conditions or for any other cause, should appear to the Owner to be unjust either to the Owner or to the Managing Agent, it shall be subject to readjustment after consultation between the parties, and the decision of the Owner shall be final.

15. Contracts with Affiliated Companies.—The Managing Agent, as representative of the Owner, shall not trade with any individual, firm or corporation in which it or any of its officials, directors or employees may have an interest, without first obtaining the written approval of the Owner, and then only on the terms specified in such approval.

16. Termination of Agreement.—

(a) Cancellation by Owner.—In the event that the Managing Agent shall fail to perform its obligations under this agreement in a manner satisfactory to the Owner, the Owner shall have the right at any time to terminate this agreement forthwith as to any and all vessels assigned to the Managing Agent, or the Owner may at any time, upon giving the Managing Agent sixty (60) days notice in writing, terminate this agreement to become effective at the expiration of said sixty (60) days or, at the option of the Owner, as to any vessel upon its arrival and discharge at a United States port thereafter.

[fol. 69] (b) Cancellation by Managing Agent.—Upon giving the Owner sixty (60) days written notice, the Managing Agent shall have the right to terminate this agreement, such termination not to become effective as to any vessel until its arrival, discharge and redelivery at a port to be designated by the Owner.

(c) Liquidation of Business.—In case of termination under either (a) or (b), or upon expiration of this agreement, all vessels and other property of whatsoever kind then in possession or control of the Managing Agent by reason of this agreement shall be immediately turned over to the Owner at times and places to be fixed by the Owner, and the Owner may collect directly, or by such agent as it may appoint, all freight moneys or other debts remaining unpaid, provided, however, the Managing Agent shall, if required by the Owner, adjust, settle and liquidate the current business of the vessels. The expense of liquidation shall be for the account of the Managing Agent.

(d). Duration of Agreement.—Unless sooner terminated by cancellation as provided herein, this agreement shall be for the period of one (1) year, provided, however, that nothing herein contained shall bind the Owner in any fiscal year for the future payment of money in excess of appropriations made by Congress for that fiscal year.

17. Bond.—Before this agreement becomes operative, the Managing Agent agrees that it will furnish and maintain during the period of this agreement at its own expense a bond with sufficient corporate surety, in the amount of Fifty Thousand Dollars ($50,000.00), such bond to be approved by the Owner both as to form and sufficiency of surety, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the Managing Agent contained in this agreement, including without limitation of the foregoing the condition to faithfully account to the owner for all funds or property [fol. 70] received by the Managing Agent, its subagents, master and other licensed officers of vessels allocated hereunder, and for funds disbursed by its subagents and by the Owner upon approval for the Managing Agent. The Managing Agent may, in lieu of furnishing such bond, pledge U. S. Government securities, $50,000.00 face value, under an agreement satisfactory in form to the Owner.

18. Trade Name.—The trade name under which a line or route is operated with vessels of the Owner shall be subject to the approval of the Owner, and shall not contain the name of the Managing Agent, and such trade name shall remain the property of the Owner.

19. Foreign Flag Vessels—Competition.—The Managing Agent shall not be permitted to operate either as agent, owner, or charterer foreign flag vessels competing with vessels documented under the laws of the United States, and/or operate any vessels in competition with vessels allocated to the Managing Agent hereunder.

20. Salvage.—Salvage claims for services rendered to vessels other than vessels owned or controlled by the Owner shall be handled by, and be under the control of, the Owner. Salvage awards for services rendered to other

vessels owned or controlled by the Owner, including other vessels of this Line, shall be made by the Owner.

21. Beneficiaries.—No member of or delegate to Congress, nor Resident Commissioner, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, except as provided in Section 116 of the Act of Congress approved March 4, 1909, (35 Stats. 1109).

22. Effective Date of Agreement.—This agreement shall become effective upon delivery of the first vessel by the Owner to the Managing Agent as herein provided.

23. Interpretation of Agreement.—Any question arising under the agreement shall be referred to the President of the Merchant Fleet Corporation for determination, and his decision shall be final.

[fol. 71] In Witness Whereof, the parties hereto have executed this agreement in triplicate as of the day and year first above written.

United States of America, by Secretary of Commerce, by United States Shipping Board Merchant Fleet Corporation, by J. C. Peacock, President. (Seal.)

Attest: S. D. Schell, Secretary.

Cosmopolitan Shipping Company, Inc., by A. F. Mack, President. (Seal.)

Attest: Lon Hudson, Asst. Secretary.

Office of the Solicitor of the Department of Commerce. Examined and found to comply with all the requirements of law and to be correct in form.

J. J. O'Hara, Acting Solicitor.

WHS.

Proofed with the Original Duplicating Section. W/G.

[fol. 72] [Endorsed:] Copy received 2/19/36. Lamar Hardy, U. S. Atty.

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT ON BEHALF OF DEFENDANTS UNITED STATES OF AMERICA, DANIEL C. ROPER, SECRETARY OF COMMERCE OF THE UNITED STATES, and LAMAR HARDY, UNITED STATES ATTORNEY

DISTRICT OF COLUMBIA, SS:

Harry S. Brown, being duly sworn, deposes and says: Deponent is Chief of Division of Regulation of the United States Shipping Board Bureau, Department of Commerce; in that capacity he is in charge of and has immediate control over the records of the Division and direct supervision, under the Secretary of Commerce, of administering certain provisions of the Shipping Act, 1916 (46 U. S. C. 801, et seq.), and of the Merchant Marine Act, 1920 (46 U. S. C. 861, et seq.)

[fol. 74] Section 21 of said Shipping Act, 1916, in part is as follows:

"That the Board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default."

That the Secretary of Commerce is by the said Act and the Executive Order of the President of June 10, 1933, charged with the duty to see to it that no common carrier by water violates the Act by making or giving any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect

whatsoever, or subjects any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (see sec. 16 of said Act), and that no common carrier by water in foreign commerce shall demand, charge or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors (see sec. 17), and whenever the Secretary of Commerce finds that any such rate, fare, or charge is demanded, charged or collected, he may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

The Secretary of Commerce is also charged with the duty of investigating the relative cost, advantages and disadvantages of operating in the foreign trade vessels under [fol. 75] United States registry and under foreign registry (see sec. 12 of said Act). In addition, he is under a duty to sell as soon as possible all of the merchant vessels owned by the United States, and, in order to accomplish this purpose, is specifically charged with keeping himself informed as to the sale price of vessels in the domestic and foreign market, the available supply of vessels and the demand for the same, existing freight rates and prospects of their maintenance (see sec. 5 of the Merchant Marine Act, 1920). In order to carry out the purposes of the said Acts and to perform the many functions and duties placed upon the Secretary of Commerce, he has found it necessary to require the submission to him by common carriers by water engaged in foreign commerce of schedules of rates and charges actually made for the transportation of property. Inasmuch as under the provisions of the law shippers and localities are given a specific interest in determining whether any undue preference or advantage is being granted any shipper or locality to the disadvantage of some other shipper or locality, it has been incumbent upon the Secretary of Commerce to make all such information as gathered by him concerning rates and charges public.

The complainant, Isbrandtsen-Moller Co., Inc., has persisted in refusing to file with the Secretary of Commerce its schedule of charges and rates made by it in connection

with the transportation of property in foreign commerce, except on the understanding that the information will be kept confidential and not be made public or divulged to any of the parties sought to be protected under the provisions of said Acts.

The Secretary of Commerce issued his order of November 18, 1935, which is the subject of the present dispute, only after failing to persuade that Company to file its regular rates. The said order of the Secretary of Commerce of November 18, 1935, was issued pursuant to the provisions [fol. 76] of Section 21 of the Shipping Act, 1916, heretofore quoted, and was for the purpose of carrying out the provisions of the aforesaid Acts.

Complainant, Isbrandtsen-Moller Co., Inc., is the only known carrier by water engaged in foreign commerce which has refused to file its schedules of rates and charges. All schedules of rates and charges filed by other carriers, whether using vessels flying the American flag, or foreign flag, whether using American-owned or foreign-owned vessels, whether members of conference agreements or not, are, at the present time, given full publicity and are, therefore, open to the complainant, Isbrandtsen-Moller Co., Inc.

The information contained in the schedule of rates filed by all other common carriers engaged in foreign commerce using ports of the United States includes the charges which said common carriers make for the transportation of different classifications of freight from ports in the United States to the ports in foreign countries covered by the respective common carriers and include also all rules and regulations of said common carriers which in any way affect such rates and charges. The rates and charges so filed by said common carriers indicate not only those which are charged as so-called regular rates and charges but also any special charges or rates which result from particular contracts which the respective common carrier may have with particular shippers and which are thereby different from the regular rates or charges. The rates and schedules so filed were those which were effective September 1st, 1935 and were to remain effective until changes were made therein by the respective common carriers, and the respective common carriers, upon making any changes in said schedules, within thirty days of the effectiveness of any such change, are filing notice of the said change with the

Secretary of Commerce. Many of said common carriers are not waiting for the lapse of the thirty day period before [fol. 77] filing notices of changes in the regular schedule, but are either giving notice of said changes before they become effective or are giving notices shortly after the same become effective.

The filing of the said schedules by the said common carriers has in every instance been made under oath, declaring that the rates and charges, rules and regulations so filed are the rates and charges, rules and regulations which have actually been observed by said common carriers. The filing of the said schedules by the said common carriers is the principal means by which it can be ascertained if the said common carriers are maintaining regular schedules of rates and charges which are applicable to all shippers alike. One of the purposes sought to be accomplished by the issuing to the complainant of the order in question, which only required it to file the charges it had made for the period from September 1, 1935 to November 12, 1935, was to determine whether or not the complainant was in fact maintaining a schedule of rates which were applicable on equal terms to all shippers or whether the complainant was charging different rates to different shippers for transportation of the same classification of freight. The complainant was not ordered under the terms of said order to disclose the name or business of any particular shipper, and had the complainant filed with the Secretary of Commerce the name of any particular shipper of any particular item of freight, the information would have been returned to the complainant as improperly filed and as disclosing the private business of the said shipper.

By reason of the fact that all other common carriers engaged in foreign commerce by water have filed all the necessary information by filing their schedules of rates, there has been no necessity to issue an order to them under Section 21 of said Shipping Act, 1916.

Under Section 15 of the Shipping Act, 1916 (46 U. S. C., sec. 814), Congress recognized the propriety of common [fol. 78] carriers by water combining together for the purpose of stabilizing rates and other practices and excepted such combinations from the provisions of the law commonly known as the Sherman Anti-trust Act and the Clayton Act, providing that the contracts, agreements and other

memoranda creating such combinations were kept on file with the Government and were approved by the Government. The Secretary of Commerce is given authority to approve, disapprove, cancel or modify any such agreements, and such agreements are scrutinized to determine whether they are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters of the United States and their foreign competitors or operate to the detriment of the commerce of the United States, and, if he finds that said agreements do not infringe in any of the ways mentioned, the Act provides that the Secretary of Commerce shall approve said agreements.

The experience of the Government has been that the existence of the conference agreements results in greater stabilization of rates and practices affecting foreign commerce and that shippers are greatly aided thereby in being able to quote prices for future delivery by reason of knowing what the freight rates will probably be in the future. With respect to many of the agreements, carriers engaged in the particular route covered by a conference agreement have been given the privilege of participating in contracts which have been signed by the members of the conference with particular shippers regarding rates, in return for an undertaking that such carriers will comply with the rates, rules and regulations of the conference, even though not becoming members.

The only purpose which the Secretary of Commerce has in scrutinizing the said conference agreements is to see that they do not violate the Act in any of the methods outlined above and to determine whether or not they actually result [fol. 79] in a monopoly which prevents any other carriers from engaging in business over the particular route covered by the conference and thereby result in undue and discriminatory rates to the detriment of shippers and the United States commerce.

While there are many foreign shipping companies and American shipping companies owning or operating foreign flag ships who are members of the conferences, the sailings of vessels flying the United States flag are in the majority of the conferences so numerous as to compare favorably with those of any other particular nation. The control by the Government of the conferences in which there are no

members who are citizens of the United States using vessels flying the United States flag has been most advantageous to the exporters and importers of the United States and has been one of the most potent methods of preventing rate wars which almost always result ultimately in excessive freight rates.

I have been informed and believe it to be the fact that Isbrandtsen-Moller Co., Inc., the complainant, is controlled by citizens of Denmark and that the president of the company is not a citizen of the United States but is an alien. All of the vessels which are operated by said company fly the flags of foreign countries.

No data concerning the failure of complainant to comply with the said order of the Secretary of Commerce of November 18, 1835, has been forwarded to the Attorney General either for the purpose of securing a mandatory order of a court to compel compliance or to enforce the collection of the amount forfeited under the provisions of said section of the Act.

[(Sgd.) Harry S. Brown.*]

Subscribed and sworn to before me this — day of January, 1936. —— ——, Notary Public. My commission expires —— —, ——.

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT ON BEHALF OF DEFENDANTS UNITED STATES OF AMERICA, DANIEL C. ROPER, SECRETARY OF COMMERCE OF THE UNITED STATES, AND LAMAR HARDY, UNITED STATES ATTORNEY—Filed June 1, 1936

DISTRICT OF COLUMBIA, ss:

Samuel D. Schell, being duly sworn, deposes and says:

Deponent is Assistant to Director of the United States Shipping Board Bureau of the Department of Commerce and is Vice President and Secretary of the United States Shipping Board Merchant Fleet Corporation and, as Secretary, is in charge of and has immediate control over the stock books and records of the said corporation. All of

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[* Signature in brackets, struck out in copy.]

the stock, with the exception of the necessary qualifying shares held by the Trustees of said Corporation, is owned by the United States of America. The said corporation has at no time conducted or engaged in and at the present time [fol. 81] does not conduct or engage in any private business on its own account.

Since the passage of the Merchant Marine Act, 1920 (46 U. S. C., 861, et seq.) all of the duties and business carried on by the said corporation have been those which have been delegated to it by the United States Shipping Board pursuant to the authority contained in paragraph 35 of said Act and by the Secretary of Commerce since the abolishment of said Board and the transfer of its functions to the Secretary of Commerce pursuant to the so-called Economy Act and its amendments (5 U. S. C., 124, et seq.) and the Executive Order of the President issued pursuant to said Economy Act dated June 10, 1933, effective August 10, 1933.

The United States as the result of the shipbuilding program initiated by the United States during the World War, owned and controlled, a large number of merchant steamships. Pursuant to the provisions of the said Merchant Marine Act, 1920, the United States Shipping Board was mandated by Congress to sell the said ships as speedily as possible and also, in order to carry out the purposes of said Act, which were to develop and encourage the maintenance of a merchant marine of the United States sufficient to carry the greater portion of the commerce of the United States and to serve as a naval and military auxiliary in time of war, to determine what steamship lines should be established and put in operation from ports in the United States to foreign ports. A number of said steamship lines were established and put in operation and as rapidly as possible were transferred to private ownership. The Secretary of Commerce as the successor of the United States Shipping Board, is now maintaining and operating a small number of said steamship lines which are still considered [fol. 82] necessary to accomplish the purposes of said Act and for which purchasers have not yet been procured. The said steamship lines are being operated for the United States by and through the United States Shipping Board Merchant Fleet Corporation, which corporation has appointed various private corporations as the managing

agents of the United States to manage and operate the said steamship lines. The said steamship lines are operated in competition with steamship lines owned by foreign companies but every effort possible has been made to prevent the said steamship lines owned by the United States being operated in competition with lines which are owned by citizens of the United States, and such competition is kept to the lowest possible minimum. The United States Shipping Board Merchant Fleet Corporation owns no steamships, and operates and controls no steamships except those owned by the United States and under the direction and control of the Secretary of Commerce.

All monies received by the said corporation from the operation of ships or from any other activity of said corporation are the property of the United States and are subject to the annual direction of Congress as expressed, since the abolishment of the United States Shipping Board and the transfer of its functions to the Department of Commerce, in the Appropriation Acts for the Department of Commerce. The said Appropriation Acts appropriate all of said monies and any other monies that may be in the possession of said corporation for the expenses of said corporation, including the costs of administration, salaries of employees of said corporation, the losses due to the maintenance and operation of said ships, for other specific purposes and for carrying out the provisions of the Merchant Marine Act, 1920, as amended.

[fol. 83] The United States Shipping Board and the Secretary of Commerce, as its successor, has authorized and has encouraged the said private corporations acting as agents in managing and operating the steamship lines owned by the United States to become members of Conferences approved as required by Section 15 of the Shipping Act, 1916 (46 U. S. C. 801, et seq.) for the purpose of stabilizing rates and other practices obtaining in the particular routes which are served by said steamship lines.

[(Sgd.) Samuel D. Schell.*]

Subscribed and sworn to before me this — day of January, 1936. —— ——, Notary Public. My commission expires —— —, ——.

[File endorsement omitted.]

[* Signature in brackets, struck out in copy.]

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF RALPH H. HALLETT

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Ralph H. Hallett, being duly sworn, deposes and says:

I am an Assistant Counsel in the office of the Solicitor of the Department of Commerce, and make this affidavit in support of the motion to quash service upon the defendants who have appeared specially herein.

On or about January 15, 1936, I requested the Chief Clerk of the Department of Commerce to furnish me with a certified copy of any order or orders issued by the Secretary of Commerce setting up the organization to administer the functions of the United States Shipping Board which had been transferred to the Department of Commerce pursuant to the provisions of Section 12 of Executive Order No. 6166.

Pursuant to said request, I received the certified copy of an order which is attached hereto.

Ralph H. Hallett.

Sworn to before me this 14th day of February, 1936.

[fol. 85] EXHIBIT TO AFFIDAVIT

Department of Commerce

Washington, January 16, 1936.

I hereby certify that the annexed is a true copy of the original Order dated August 9, 1933, issued by the Secretary of Commerce, setting up of a Bureau to be known as the United States Shipping Board Bureau, on file in the Office of the Chief Clerk, Department of Commerce.

(Sgd.) E. W. Libbey, Chief Clerk (Official Title).

Office of the Secretary

I hereby certify that E. W. Libbey who signed the foregoing certificate, is now, and was at the time of signing

Chief Clerk, Department of Commerce and that full faith and credit should be given his certificate as such.

In Witness Whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this sixteenth day of January, one thousand nine hundred and thirty-six.

(Sgd.) Daniel C. Roper, Secretary of Commerce.
(Seal.)

[fol. 86] Department of Commerce, Office of the Secretary, Washington

August 9, 1933.

Pursuant to the provisions of Section 12 of the Executive Order of June 10, 1933, transferring the functions of the United States Shipping Board including those over and in respect to the United States Shipping Board Merchant Fleet Corporation, to the Department of Commerce, there is hereby established in the Department of Commerce a Bureau to be known as the United States Shipping Board Bureau. The Bureau will be under the jurisdiction of Assistant Secretary Mitchell.

All units of the United States Shipping Board as of August 9, 1933, shall continue for the present to perform the same duties in said Bureau as heretofore performed under the Shipping Board.

All orders, rules, regulations, permits or privileges heretofore made, issued, or granted by United States Shipping Board and in effect on August 9, 1933, shall continue in effect until modified, superseded, or repealed. All decisions and official acts heretofore made or exercised by the United States Shipping Board shall be hereafter made or exercised by the Secretary of Commerce.

[fols. 87 & 88] All incoming correspondence, not addressed to a particular individual, shall be routed in the usual Departmental manner. Copies of all communications regarding questions of policy upon which the Secretary of Commerce has acted or has action pending before him, and matters which will require action by the Secretary of Commerce involving major policies, shall be immediately forwarded to Assistant Secretary Mitchell for transmission to the Secretary of Commerce. Correspondence or letters

relating to such matters shall be prepared under the direction of Assistant Secretary Mitchell for the signature of the Secretary of Commerce.

If the Secretary of Commerce deems it advisable he may refer any questions to an Advisory Committee for its advice. Said Advisory Committee will include in its membership the present members of the Shipping Board. It will receive the reports of any examiners appointed to investigate facts in connection with any proposed exercises of authority, and will report to the Secretary. The Advisory Committee will also advise the Secretary, if he so desires, as to the assignment of any matter to examiners for investigation and report.

(Signed) Daniel C. Roper, Secretary of Commerce.

[fol. 89] In United States District Court, Southern District of New York

Isbrandtsen-Moller Co., Inc., Complainant,

against

The United States of America, The Department of Commerce of the United States, the Shipping Board Bureau of the Department of Commerce of the United States, Daniel C. Roper, Individually and as Secretary of Commerce of the United States; James C. Peacock, Individually and as Director of the Shipping Board Bureau of the Department of Commerce of the United States, and Lamar Hardy, Individually and as United States Attorney for the Southern District of New York, Defendants

Before Chase, Circuit Judge; Bondy and Patterson, District Judges

Opinion—Filed April 8, 1936

In Equity. Suit in the District Court for the Southern District of New York to enjoin the defendants temporarily and permanently from enforcing an order of defendant Roper dated November 18, 1935 ostensibly made in the exercise of the functions formerly of the United States Shipping Board Bureau that were transferred to the De-

partment of Commerce by executive order No. 6166 promulgated June 10, 1933 to become effective August 10, 1933 under authority of the Executive Department Reorganization Act of 1932 as amended. (5 U. S. C. A. Sec. 124 et seq.) The hearing was by a court constituted in accordance with the provisions of Sec. 47 of Title 28 U. S. C. A. Bill dismissed.

[fol. 90] The bill alleged that the complainant was a New York corporation having its principal office in the Southern District of New York, authorized to operate, and operating, steamships and carrying cargoes in foreign commerce between the United States and other countries; that the Department of Commerce of the United States is an executive department of the government with offices in the District of Columbia; that the Shipping Board Bureau of the Department of Commerce of the United States is a bureau of the Department of Commerce with offices at the same place; that Daniel C. Roper is Secretary of Commerce of the United States who is the head of the Department of Commerce and an executive officer subject to the direction of the President of the United States; on information and belief that James C. Peacock resides in the District of Columbia and is Director of the Shipping Board Bureau of the Department of Commerce of the United States, Chairman of the Board of Trustees and President of the United States Merchant Fleet Corporation and as such is a member of the Steamship Conferences; and that Lamar Hardy is a resident of the Southern District of New York for which he is the United States Attorney.

It was alleged that the suit was an actual controversy arising under the constitution and laws of the United States brought in the Southern District of New York in accordance with the provisions of 28 U. S. C. A. Secs. 43, 44, 45 and 47; of the Shipping Act of 1916 (46 U. S. C. A. Sec. 830) and of the Judicial Code (28 U. S. C. A. Sec. 46) "to suspend, enjoin, set aside or annul an order issued [fol. 91] on the 18th day of November, 1935, by the defendant Daniel C. Roper, Secretary of Commerce of the United States, purporting to act on behalf of the defendant Department of Commerce and the defendant Shipping Board Bureau of said Department, as alleged successor of the United States Shipping Board."

The order follows:

"Department of Commerce, Office of the Secretary, Washington

In the Matter of Filing Rates and Charges by Common Carriers by Water in Foreign Commerce

Order

It appearing, That full and complete information as to the rates and charges for or in connection with the transportation of certain property from continental United States to points in foreign countries by carriers by water in foreign commerce subject to the Shipping Act, 1916, is necessary to the proper administration of the regulatory provisions of said act;

It appearing further, That Isbrandtsen-Moller Company, Inc., is a common carrier by water in foreign commerce subject to the Shipping Act, 1916;

It is ordered, In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916, that Isbrandtsen-Moller Company, Inc., be, and it is hereby, notified and required to file with the Division of Regulation, United States Shipping Board Bureau, of this Department, at its office in Washington, D. C., on or before December 16, 1935 [fol. 92] each port-to-port and trans-shipment rate charged and/or collected by it during the period from September 1, 1935, to November 12, 1935, both dates inclusive, for the transportation of property, except cargo loaded and carried in bulk without mark or count, from all points in continental United States of America to all points in foreign countries; indicating plainly as to each such rate, the place from and to which it was charged and/or collected, the effective date thereof, and the name, in alphabetic order, of each commodity moving thereunder; showing also each terminal or other charge, privilege or facility, granted or allowed, and any rules or regulations which in anywise changed, affected, or determined any part of any such aforesaid rate, or the value of the service rendered to the consignor or consignee;

It is further ordered, That the aforesaid filing be in printed, typewritten, or mimeographed form, personally subscribed by an officer of said Isbrandtsen-Moller Com-

pany, Inc., who shall specify his title and verify the accuracy and completeness thereof under oath;

It is further ordered, That copy of this order be served upon said Isbrandtsen-Moller Company, Inc.

(Sgd.) Daniel C. Roper, Secretary of Commerce.

November 18, 1935."

It was also alleged that the complainant had unsuccessfully tried to have defendant Roper extend the time for [fol. 93] filing the required data to permit Congress to act in the matter and to have it kept only for the information of the Department of Commerce undisclosed to plaintiff's competitors on the ground that the true purpose of the order "was to obtain information to be made available to complainant's competitors to aid them in their endeavor to drive the complainant out of business" and because "the functions, powers and duties of the United States Shipping Board had never been validly transferred to the Department of Commerce or to the defendant Roper as head of that Department."

It was alleged that the defendants except Hardy asserted their right to exercise the wide powers of control and the discretionary judgment originally committed to the United States Shipping Board and the grounds for the allegation of the invalidity of the transfer of the functions and the Shipping Board to the Department of Commerce were set forth at length. They were briefly that the Shipping Board was made up of members appointed for a fixed term from different sections of the country so as to insure proper geographical representation; that said members were not removable except for inefficiency, neglect of duty, or misconduct in office; that complainant was advised and believed that Congress intended the Shipping Board "to be entirely independent of the President and of the various executive departments and to exercise semi-judicial powers like the Interstate Commerce Commission and the Federal Tariff Commission; and that Congress did not intend to authorize and, in fact has not authorized, an executive [fol. 94] bureau such as the Shipping Board Bureau of the Department of Commerce to exercise discretionary powers over the American shipping industry; that executive order No. 6166 of June 10, 1933 purporting to abolish the United States Shipping Board was ineffective for that

purpose in that the Shipping Board was an independent body free from executive control; and that the order of defendant Roper dated November 18, 1935 is null and void in that "the regulatory powers entrusted to the Shipping Board by the Shipping Act of 1916, in the attempted exercise of which said order was issued by the defendant Roper, could never be constitutionally exercised by an officer, board, bureau, agency, or department of the executive branch of the Government by reason of the separation of legislative, judicial and executive powers provided and guaranteed by the Constitution of the United States; "that there was no "adequate declaration of policy or standard of action" in the Executive Department Reorganization Act of 1932, to make it valid; and that the President promulgated executive order No. 6166 without adequate hearings and findings of fact on which to base it. Allegations that complainant had exhausted its administrative remedy against enforcement of the order; that it was subject to a daily penalty for non-compliance and that its only adequate remedy was in equity by way of injunction to prevent its being subjected to irreparable damage were followed by its prayer for relief.

A second cause of action alleged that defendant Roper had before November 18, 1935 transferred "all his func- [fol. 95] tions and duties in connection with the subject matter of said order to the defendant James C. Peacock" who had since undertaken "to exercise the functions committed to the United States Shipping Board by the Shipping Act, 1916, as amended;" that Peacock "as President and Chairman of the Board of Trustees of the United States Merchant Fleet Corporation did on November 18, 1935, and ever since has controlled steamships whose operators are members of conferences or groups of steamship companies combined by contract together to fix rates and otherwise further a shipping monopoly solely for the selfish purpose of making greater profits for certain steamship companies, most of which are owned by aliens residing in foreign countries, and most of whose vessels are operated under the flags of foreign countries, and to eliminate competition by any independent or non-conference company such as complainant;" and that "the separation of powers between the legislative, judicial and executive branches of

the Government and the Due Process Clause of the Fifth Amendment to the Constitution of the United States prohibit the exercise of regulatory or quasi-judicial functions such as were entrusted to the United States Shipping Board by the Shipping Act, 1916, by persons or agencies having interests and purposes above set forth, and therefore, render null and void the said order of November 18, 1935".

A third cause of action alleged that the order of November 18, 1935 was not issued for a public purpose authorized or designated by Congress but in aid of a monopoly composed of the complainant's competitors and to force the complainant which is an independent, unsubsidized, [fol. 96] non-conference line, either to join a conference or shipping monopoly, which it could not lawfully be compelled to join, or else to suffer serious damage to, if not complete destruction of, its business from the disclosure to its competitors, members of said conferences or shipping monopoly, of its private business records and rates charged and commodities moved by it."

A fourth cause of action alleged unjust discrimination against complainant in ordering it "to file actual rates charged by it on particular goods between named ports, whereas the only order issued by the defendants to complainant's competitors, the said Conference Lines, requires merely the filing of general rate schedules which are not always adhered to, and which need not be adhered to under any law or government regulation"; and that "the only order issued by the defendants to said competitors was not issued under Sec. 21 or any other section of the Shipping Act, 1916, and carried no penalties for non-observance."

A fifth cause of action added allegations that the complainant had promptly sought relief; had offered to furnish the required data provided it was not revealed to its competitors or made public; and that the suit was brought in good faith.

Upon the bill of complaint supported by affidavit, the complainant moved for a temporary injunction as prayed for. The Department of Commerce of the United States, The Shipping Board Bureau of the Department of Commerce of the United States, and James C. Peacock, individually and as Director of The Shipping Board Bureau

[fol. 97] of the Department of Commerce of the United States, appeared specially and moved to quash the service of subpoenas upon them and to dismiss the bill as to them "for want of proper jurisdiction and venue". An order to show cause why the temporary injunction should not be issued was duly made. The other defendants appeared generally and moved to dismiss the bill on the merits. These motions were argued at the hearing on the order to show cause.

Davis, Polk, Wardwell, Gardiner & Reed, Solicitors for Complainant.

Lamar Hardy, U. S. Attorney for the Southern District of New York, Solicitor for Defendants;

John F. Davison, Assistant U. S. Attorney;

Ralph H. Hallett, Assistant Counsel, Department of Commerce;

Richard J. Burke, Special Assistant to the United States Attorney, Of Counsel.

CHASE, Circuit Judge:

The service upon the defendants who have appeared specially was not made within the Southern District of New York but instead within the District of Columbia. That is the real ground of the motion to quash. But it is clear that this court has jurisdiction over the subject matter of the cause of action and that as the complainant resides within the Southern District of New York the venue is in accordance with the provisions of 28 U. S. C. A. Sec. 43. And Sec. 44 of the same title provides that in cases of the class in which this one falls "The order, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States". These sections related to suits in regard to orders of the [fol. 98] Interstate Commerce Commission and by Sec. 31 of the Shipping Act of 1916 (46 U. S. C. A. Sec. 830) were made to apply to similar suits relating to orders of the Shipping Board. Hence the service upon those defendants in the District of Columbia was good and the issue on their motion is narrowed to whether or not they are proper parties. This in turn depends upon whether they have any interest in the cause of action.

The Executive Department Reorganization Act of June 30, 1932, amended Mar. 3, 1933, (5 U. S. C. A. Sec. 124 et

seq.) provided that the President should investigate and determine what changes were necessary in the executive and administrative agencies of the government to accomplish stated ends, among them to reduce expenses and increase efficiency; and gave him the power to

"(a) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;

(b) Consolidate the functions vested in any executive agency; or

(c) Abolish the whole or any part of any executive agency and/or the functions thereof; and

(d) Designate and fix the name and functions of any consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof."

[fol. 99] And it was further provided in Sec. 130, that, "Whenever the President makes an Executive order under the provisions of this chapter, such Executive order shall be submitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall by law provide for an earlier effective date of such Executive order or orders." Executive agency was defined to be "any commission independent establishment, board, bureau, division, service of office in the executive branch of the Government * * *". Executive Order No. 6166 in Sec. 12 provided that, "The functions of the United States Shipping Board including those over and in respect to the United States Shipping Board Merchant Fleet Corporation are transferred to the Department of Commerce and the United States Shipping Board is abolished." The order was transmitted to Congress as required and became effective August 10, 1933. Thus the Department of Commerce was made to take over the functions of the Shipping Board. But it is a part of the executive establishment of the United States and a suit against it is in reality a suit against the United States. The

United States was made a party to this suit and is a necessary party. 28 U. S. C. A. Sec. 46; Illinois Central Railroad Co. v. Public Utilities Commission, 245 U. S. 493. As the United States has consented to be sued and is a party and neither one of its departments nor any subdivision of such department can have any interest in the action [fol. 100] other or different than that of the United States itself they appear to have no interest which will support the contention that they are proper parties and the motion to dismiss as to them is granted. Nor has defendant Peacock either individually or otherwise any interest in the suit. He did not issue the order which is under attack. So the motion in his behalf will be granted.

Further decision must turn on the sufficiency of the bill on the merits. It is clear that it should be dismissed as to defendant Hardy who is not alleged to have had any connection with the subject matter of the suit, it being alleged merely that he is the United States Attorney for the Southern District of New York. As to the remaining defendants the issue has two aspects; (1) whether the Executive Department Reorganization Act, as amended, (5 U. S. C. A. Sec. 124 et seq.) authorized the President to abolish the Shipping Board and transfer its functions to the Department of Commerce and (2) whether, if so, Congress had the power so to do.

As to (1) it may be said that it is doubtful whether the Shipping Board was fairly within the definition of the term "executive agency" found in Sec. 125 of the Act. It would appear more nearly correct to have considered it a board of specially selected members with neither political nor executive functions whose duties were quasi-judicial and quasi-legislative like those of the Federal Trade Commission. See Humphrey's Executor v. United States, 295 U. S. 602. But doubt as to whether the Executive Department [fol. 101] Reorganization Act was intended by Congress to confer upon the President the authority he exercised in respect to the Shipping Board must be resolved against the complainant in view of the fact that after the order had been promulgated Congress adopted the construction thus given the Act by permitting the order to become effective after notice to it and the expiration of the prescribed time and also by passing on April 7, 1934 the Department of Commerce Appropriation Act (48 Stat. 546-566) pro-

viding funds to pay the salaries and expenses of that department, inter alia, "To carry out the provisions of the Shipping Act of 1916, as amended, and the Merchant Marine Acts of 1920 and 1928, as amended, (U. S. C. A. title 46 secs. 804, 805, 861-889; * * *; Executive Order numbered 6166, June 10, 1933) * * *." Again on March 22, 1935 it provided funds for the same department for another fiscal year using similar language. We think all this amply shows that Congress intended to confer upon the President authority to abolish the Shipping Board and transfer its functions to the Department of Commerce.

There remains only the question of the power of Congress to do that. On this point we are concerned with power regardless of the wisdom or effect of its exercise as a matter of good public policy. Much of the complainant's argument has been directed to the public benefit which would flow from keeping the functions formerly of the Shipping Board independent and free from the direct control an executive can exert over the Department of Commerce. Perhaps that is so but that is for Congress to decide in the [fol. 102] performance of its duty to legislate in the public interest and so long as it acts within the scope of its power as the national legislature its choice of means and methods are to be given effect.

It is not, nor could it successfully be, disputed that Congress had the power to delegate to the Shipping Board in the manner it did so, the powers and duties that board possessed before Executive Order No. 6166 was promulgated. The change which has been made clothes an executive department with the same powers and duties to be exercised in the same way as before. We think that the same powers and duties which were properly delegated to the Shipping Board could be so delegated to any other person or body to which Congress should see fit to cause them to be transferred. It elected to have the President investigate and decide what should be done in this regard in the furtherance of efficiency and economy and then adopted his decision. The result was to abolish a board whose existence was dependent upon the will of Congress and to delegate to the Department of Commerce the same powers and duties the board had possessed. This seems in accord with correction standards as to delegation of authority to act within proper limits prescribed by Con-

gress. See, Panama Refining Co. v. Ryan, 293 U. S. 495. Whether the delegation, assuredly proper in subject matter and law fully defined in scope, purpose and manner of exercise, should have been to an executive department was within the sound discretion of Congress. As it did not confer upon anyone functions it was bound to keep and exercise for itself, there was no failure to preserve the required [fol. 103] separation of governmental powers. Regulatory powers wide in scope have been lawfully conferred upon the Secretary of Agriculture. Stafford v. Wallace, 258 U. S. 495; Tagg Bros. v. United States, 280 U. S. 420. Upon the Secretary of Labor. Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320. And upon the Secretary of the Interior. United States ex rel Riverside Oil Co. v. Hitchcock, 190 U. S. 316.

The allegation that the President acted without adequate hearings and findings is but a conclusion. His order stated that he had investigated and the contrary not appearing, the presumption of regularity is sufficient to support the official act of a public officer. United States v. Chemical Foundation, 272 U. S. 1; Dakota Central Telephone Co. v. So. Dakota, 250 U. S. 163. The bill contains its own refutation of the charge of unjust discrimination because other steamship companies have not been subjected to a like order. It is alleged that this complainant is in a different situation from those against whom a different order was issued. There is no showing that there has been any arbitrary or intentionally unfair discrimination against this complainant in favor of others in like situation. See Mackay Telegraph & Cable Co. v. City of Little Rock, 250 U. S. 94. Nor is the fact that the complainant was subject to a penalty sufficient to show irreparable injury. Though it was one hundred dollars per day it may well be only enough to encourage compliance without discouraging resort to the courts where, as here, there are reasonable [fol. 104] grounds for so doing. See Life & Casualty Ins. Co. of Tenn. v. McCray, 291 U. S. 566.

Motion for an injunction denied and bill dismissed.

In re Isbrandtsen-Moller Co., Inc.
Concur: Wm. Bondy, D. J.

In re Isbrandtsen-Moller Co., Inc.
Concur: R. P. Patterson, D. J.

[fol. 105] [File endorsement omitted.]

[fol. 106] IN UNITED STATES DISTRICT COURT

Present: Honorable Harrie B. Chase, Circuit Judge. Honorable William Bondy, District Judge. Honorable Robert P. Patterson, District Judge.

E 82-92

ISBRANDTSEN-MOLLER CO., INC., Complainant,

against

THE UNITED STATES OF AMERICA, THE DEPARTMENT OF COMMERCE OF THE UNITED STATES, The Shipping Board Bureau of the Department of Commerce of the United States, Daniel C. Roper, Individually and as Secretary of Commerce of the United States; James C. Peacock, Individually and as Director of the Shipping Board Bureau of the Department of Commerce of the United States, and Lamar Hardy, Individually and as United States Attorney for the Southern District of New York, Defendants

FINAL DECREE—May 22, 1936

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

[fol. 107] Ordered, Adjudged and Decreed that the complainant's motion for an interlocutory injunction until entry of the final decree herein be, and the same hereby is, denied in all respects; and it is

Further Ordered, Adjudged and Decreed that the motion of the defendants, The Department of Commerce of the United States, The Shipping Board Bureau of the Department of Commerce of the United States, and James C. Peacock, individually and as Director of The Shipping Board Bureau of The Department of Commerce of the United States, to dismiss the bill of complaint as to them for want of proper jurisdiction and venue be, and the same hereby is, granted on the ground that they are not proper parties to this suit; and it is

Further Ordered, Adjudged and Decreed that the motion of the defendants, United States of America, Daniel C. Roper, individually and as Secretary of Commerce of the

United States, and Lamar Hardy, individually and as United States Attorney for the Southern District of New York, to dismiss the bill of complaint for failure to state facts sufficient to constitute a cause of action be, and the same hereby is, granted in all respects, and the bill of complaint be, and the same hereby is, dismissed with costs to be taxed.

Harrie B. Chase, U. S. C. J. Wm. Bondy, U. S. D. J.
Robert P. Patterson, U. S. D. J.

[fol. 108] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Your petitioner, Isbrandtsen-Moller Co., Inc., respectfully shows:

On January 3, 1936, a bill of complaint was filed by complainant in the above entitled cause in the United States District Court for the Southern District of New York, and shortly thereafter an application was filed by complainant for an interlocutory injunction under Section 31 of the Shipping Act, 1916 (46 U. S. Code Sec. 830) and under 26 U. S. Code Secs. 46 and 47, restraining the enforcement of [fol. 109] the order of November 18, 1935, made by the defendant Roper, Secretary of Commerce, purporting to be in pursuance of the powers conferred on the United States Shipping Board by Section 21 of the Shipping Act 1916, said order requiring the complainant to file on or before December 16, 1935, the freight rates it had charged during the period from September 1, 1935, to November 12, 1935, with a list of the commodities moving thereunder, and the ports between which such commodities were carried.

On January 22, 1936, the defendants United States of America, Daniel C. Roper, individually, and as Secretary of Commerce, and Lamar Hardy, individually, and as United States Attorney for the Southern District of New York, served a notice of cross-motion to dismiss the bill of complaint and petition as against them for failure to state facts sufficient to constitute a cause of action in equity.

On January 22, 1936, the defendants Department of Commerce of the United States, the Shipping Board Bureau of the Department of Commerce of the United States, and James C. Peacock, individually and as Director of the Shipping Board Bureau of the Department of Commerce of the United States, served a special appearance and notice of cross-motion and affidavit to quash the alleged service of process upon those defendants, to vacate and set aside returns of the Marshal, and to dismiss the complaint and petition as against them for want of proper jurisdic-
[fol. 110] tion and venue.

The said application for an interlocutory injunction and the said motion to dismiss as to certain defendants for failure to state facts sufficient to constitute a cause of action and the said motion to quash process as to certain other defendants thereafter regularly came on for hearing before three judges, and after taking the matter under submission the said three judges filed a written opinion and on the 22nd day of May, 1936, filed and entered a final decree, granting said motion to dismiss of certain defendants and the said motion to quash process of certain other defendants and denied the application for an interlocutory injunction.

The said final decree is greatly to the prejudice of your petitioner and is erroneous and inequitable.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignments of error and prayer for reversal, filed with the clerk pursuant to Rule 9 of the Rules of the United States Supreme Court; and there has been likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rule 12 of the Rules of the United States Supreme Court.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays for the allowance of an appeal in said cause to the Supreme Court of the United States agreeable to the statutes and rules of said Court in [fols. 111 & 112] such cases made and provided, and that a proper order touching the security required of the petitioner may be made.

May 22, 1936.

Theodore Kiendl, Counsel for Appellant. Davis, Polk, Wardwell, Gardiner & Reed, Of Counsel.

[fol. 113] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

Appellant, Isbrandtsen-Moller Co., Inc. assigns the following errors in the record and proceedings in the above entitled cause:

1. The Court erred in failing to hold that it was not the intent of Congress that the United States Shipping Board be abolished and its functions transferred to defendant Department of Commerce.

2. The Court erred in failing to hold that it was the purpose of Congress in creating the Shipping Board to create an independent, regulatory board performing quasi-legislative, quasi-judicial functions.

[fol. 114] 3. The court erred in failing to hold that in passing the amended Economy Act of March 3, 1933, Congress did not intend that the powers of independent regulatory boards, such as the Shipping Board, be transferred to the executive branch of the government.

4. The court erred in failing to hold that Congress has not ratified the purported transfer of the functions of the Shipping Board to defendant Department of Commerce.

5. The court erred in failing to hold that even if it be assumed that it was the intent of Congress that the functions of the Shipping Board be transferred to defendant Department of Commerce, Congress is without authority under the Constitution to do so.

6. The court erred in failing to hold that the transfer of the regulatory functions of the Shipping Board to the Department of Commerce is in contravention of the well established principle that the three branches of Government be kept separate and distinct.

7. The court erred in failing to hold that the purported transfer of the regulatory functions of the Shipping Board to defendant Department of Commerce amounts to an unconstitutional delegation of legislative power.

8. The court erred in failing to hold that the effect of the order of defendant Secretary of Commerce of November 18, 1935, is to deprive complainant of fundamental rights guaranteed to it by the Constitution.

9. The court erred in failing to hold that the order of November 18, 1935, deprives complainant of its property without due process of law.

[fol. 115] 10. The court erred in failing to hold that the order of November 18, 1935 is unconstitutional on the further ground that it amounts to an unreasonable search and seizure and within the meaning of the Fourth Amendment.

11. The Court erred in holding that Executive Order No. 6166, issued June 10, 1933, was transmitted to Congress as required by law, and that it became effective August 10, 1933, Congress having in fact adjourned on June 16, 1933, shortly after transmission of said Executive Order to Congress, so that the statutory condition was not complied with that no such order should be valid or effective unless submitted to Congress while in session for a period of sixty days before the proposed or designated effective date of the order.

12. The Court erred in holding that by Executive Order No. 6166, the Department of Commerce was by law made to take over the functions of the Shipping Board.

13. The Court erred in holding that the United States Shipping Board has ever been an executive agency in any of the executive departments, or has been an executive agency, or a part of the executive establishment of the United States.

14. The Court erred in holding that neither the Department of Commerce of the United States nor the Shipping Board Bureau of the Department of Commerce of the United States is a proper party to this suit, or has any interest in it.

15. The Court erred in holding that the defendant Peacock neither individually nor otherwise has any interest in this suit and is not a proper party.

[fol. 116] 16. The Court erred in holding that defendant Peacock did not in effect issue, or substantially participate

in issuing, the defendant Roper's order of November 18, 1935.

17. The Court erred in holding that defendant Hardy had no connection with this suit, and that there is no allegation in the bill of complaint that he had such connection.

18. The Court erred in holding that the Executive Department Reorganization Act, as amended (5 U. S. C. A. Sec. 124 et seq.) authorized the President to abolish the United States Shipping Board and to transfer its functions to the Department of Commerce.

19. The Court erred in holding that Congress had the power under the Constitution of the United States to delegate to the President of the United States the power to abolish the United States Shipping Board and to transfer its functions to the Department of Commerce.

20. The Court erred in holding that the United States Shipping Board was an executive agency as defined or found in Section 125 of the Economy Act or of that Act as amended.

21. The Court erred in failing to hold that the United States Shipping Board was a board whose duties were quasi judicial and quasi legislative like those of the Federal Trade Commission.

22. The Court erred in failing to hold that the President had no power to remove from office without just or reason-[fol. 117] able cause any one or all of the Commissioners of the United States Shipping Board after they had been appointed for unexpired terms of years, and after their nominations had been confirmed by the Senate.

23. The Court erred in holding that the Executive Department Reorganization Act was intended by Congress to confer upon the President the authority he attempted to exercise in respect of the United States Shipping Board.

24. The Court erred in holding that after Executive Order No. 6166 had been promulgated, Congress ratified it or adopted the construction thus given the Executive Department Reorganization Act by permitting the order to become effective after notice to it and the expiration of the prescribed time.

25. The Court erred in holding that Congress ratified Executive Order No. 6166 by passing on April 7, 1934, the Department of Commerce Appropriation Act (48 Stat. 546-566) providing funds to pay the salaries and expenses of that department.

26. The Court erred in holding that Congress ratified Executive Order No. 6166 on March 22, 1935, by providing funds for the use of the Department of Commerce for another fiscal year.

27. The Court erred in holding that Congress intended to confer upon the President authority to abolish the Shipping Board and transfer its functions to the Department of Commerce.

[fol. 118] 28. The Court erred in holding that Congress had the power under the Constitution of the United States to delegate to an executive department or to any other person or body the powers and duties possessed by the United States Shipping Board.

29. The Court erred in holding that Congress had the power under the Constitution of the United States to delegate to the President the power to investigate and decide, even to the extent of abolition, what should be done in connection with the United States Shipping Board in the furtherance of efficiency and economy.

30. The Court erred in holding that Congress adopted the decision of the President with respect to abolition of the United States Shipping Board or the transfer of its functions to the Department of Commerce.

31. The Court erred in holding that the delegation of authority to the President in the Economy Act, or in that Act as amended was, if so broadly construed as to include abolition of the Shipping Board, a delegation in accord with correct standards as to delegation of authority to act within proper limits prescribed by Congress.

32. The Court erred in holding that the delegation of power to the President as broadly construed by the Court was proper in subject matter or lawfully defined in scope, purpose or manner of exercise.

33. The Court erred in holding that judicial functions of the United States Shipping Board were lawfully trans-

[fol. 119] ferred by the President by delegated authority from Congress to an Executive Department.

34. The Court erred in holding that legislative functions of the United States Shipping Board were lawfully transferred by the President by delegated authority from Congress to an Executive Department.

35. The Court erred in holding that Congress can lawfully under the Constitution of the United States delegate to the President the power to in turn delegate legislative or judicial power to an Executive Department.

36. The Court erred in holding that Congress cannot only delegate legislative power but can delegate to a person the power to delegate Congress' legislative power to a third person.

37. The Court erred in ignoring the uncontradicted evidence, consisting of the affidavit of Hans Isbrandtsen, by holding that the defendant Roper held any hearing or made any finding preliminary to issuing his order of November 18, 1935.

38. The Court erred in holding, without any evidence whatever to support it, that the President held a hearing or acted with adequate hearing or made a finding before purporting to exercise Congress' legislative power in abolishing the United States Shipping Board and transferring its functions to the Department of Commerce.

[fol. 120] 39. The Court erred in ignoring the uncontradicted verified allegations in the bill of complaint, and in ignoring the uncontradicted evidence, consisting of the affidavits of Hans Isbrandtsen and in holding that there is no showing or evidence that there has been any arbitrary or intentionally unfair discrimination against the complainant in favor of others in like situation.

40. The Court erred in ignoring the uncontradicted allegations in the verified complaint, and the uncontradicted affidavits of Hans Isbrandtsen, in holding that no unjust discrimination was alleged or shown on the ground that the steamship companies have not been subjected to a like order.

41. The Court erred in holding that the fact that the complainant was subject to a penalty was not sufficient to

entitle it to an interlocutory injunction or to show irreparable injury.

42. The Court, in view of its finding that there was reasonable ground for complainant to resort to the courts, erred in holding that the penalty imposed on complainant by defendant Roper's order of November 18, 1935, was only enough to encourage compliance without discouraging resort to the courts.

43. The Court erred in denying the application by complainant for an interlocutory injunction.

44. The Court erred in dismissing the bill of complaint.

[fol. 121] 45. The Court erred in holding that complainant was lawfully required to comply with defendant Roper's order of November 18, 1935, after the defendant Roper had declined to accept complainant's offer to supply any data desired for the Department of Commerce's own information and had asked only that the details of complainant's business and of complainant's customers' business should not be made available by defendant Roper to complainant's competitors, the Conference Lines or Steamship Combination; and after the defendant Roper had made it clear to complainant that the Department of Commerce intended to give the Conference Lines the benefit of the data which complainant had ordered to file.

46. The Court erred in holding that complainant which was not a member of any Conference could lawfully be compelled by defendant Roper by the order of November 18, 1935, to file rates and other data which Conference Members were already by law compelled to file by section 15 of the Shipping Act, 1916, because such Conference Members were violating the Sherman Anti Trust Act of Congress, and it was only by approval by the Shipping Board of the Conference Members' agreements as to rates that the Conference Members could escape prosecution under the provisions of the Anti Trust Laws of the United States.

47. The Court erred in failing to hold that defendant Roper's order of November 18, 1935, was invalid and un-[fol. 122] justly discriminatory against complainant in requiring it to file actual rates charged and list actual shipments moved and geographical points between which such

shipments moved, thus, if the order were complied with, disclosing the innermost private trade details of complainant's business to its competitors, the Conference Lines or Shipping Combination, whereas the Conference Lines have never been required by defendant Roper or the Shipping Board to do anything but file general rate schedules under section 15 of the Shipping Act, 1916, which schedules are not always, and under the law or by any order of defendant Roper or of the Shipping Board, need not be adhered to by them.

48. The Court erred in failing to hold that it was unlawful for the defendant Roper by his order of November 18, 1935, to single complainant out for special discriminatory treatment and require it to file actual rates charged on particular goods between named ports, whereas no such requirement has ever been made of any other steamship company, American or foreign, operating or ever operated, in the foreign trade of the United States.

49. The Court erred in holding that the Department of Commerce or the United States Shipping Board is authorized by law to publish rates or the other information re- [fol. 123] quired by defendant Roper's order of November 18, 1935, to be filed.

50. The Court erred in holding that the Department of Commerce or the United States Shipping Board is authorized to regulate or stabilize rates of common carriers by water in the foreign trade of the United States.

51. The Court erred in holding in effect that the Department of Commerce or the United States Shipping Board is authorized by law to engage in a fishing expedition into the private records and business of complainant in the hope of obtaining evidence of some discrimination against the shippers, ports, or localities in the absence of any complaint or charge made or filed against complainant by a shipper, port or locality, or by the Shipping Board or Department of Commerce, that such a discrimination has been made, or that reasonable ground exists for believing that such a discrimination has been made.

52. The Court erred in holding that defendant Roper's order of November 18, 1935, would have been valid if it had been issued by the United States Shipping Board.

53. The Court erred in holding that Executive Order No. 6166 was valid.

[fol. 124] 54. The Court erred in holding that defendant Roper's order of November 18, 1935, was issued in pursuance of powers conferred by section 21 of the Shipping Act, 1916 (46 U. S. C. sec. 820), or was necessary or proper to the administration of any regulatory provisions of that Act.

55. The Court erred in holding in effect that the defendants are authorized to aid complainant's competitors and seriously injure complainant's business by procuring information regarding complainant's private business by means of defendant Roper's order of November 18, 1935, and revealing it to complainant's competitors.

56. The Court erred in holding that Congress ratified the President's action by Executive Order No. 6166 in attempting to abolish the United States Shipping Board and transfer its functions to the Department of Commerce.

57. The Court erred in not holding that the order of November 18, 1935, of the defendant Roper was invalid.

58. The Court erred in not holding that the Executive Order No. 6166 of June 10, 1935 was invalid in so far as it purported to abolish the United States Shipping Board, and to transfer all its functions to the Department of Commerce.

[fol. 125] 59. The Court erred in failing to hold that the United States Shipping Board consisted of Commissioners who were to constitute a geographically representative national board and who were required to be appointed respectively from different sections of the country so as to insure proper geographical representation, and that once they were appointed for fixed terms of years, and their nominations conferred, they could not be lawfully removed from office by the President excepting for inefficiency or misconduct.

60. The Court erred in failing to hold that the United States Shipping Board was obviously intended by Congress to be entirely independent of the President and of the various Executive Departments, and to exercise quasi-

judicial powers like the Interstate Commerce Commission and the Federal Tariff Commission.

61. The Court erred in holding that a subordinate bureau in an executive department, or an executive department itself, is entitled to exercise the wide powers of control and the discretionary judgment committed by Congress to the United States Shipping Board of several nationally representative Commissioners.

62. The Court erred in holding that Congress ever intended to authorize, or in fact authorized, an executive department or bureau to exercise discretionary powers over the shipping industry of the United States such as had been conferred on the United States Shipping Board.

63. The Court erred in holding that the details of complainant's private business and of complainant's customers' business could lawfully be required by defendant Roper's order of November 18, 1935, to be made available to complainant's competitors the so called Conference Lines, Shipping Combination, or Steamship Monopoly.

[fol. 126] 64. The Court erred in failing to hold that the defendant Roper's order of November 18, 1935, was in substance an unlawful effort to foster a monopoly which is predominately foreign and which has as its avowed purpose to monopolize transportation of United States foreign commerce.

65. The Court erred in failing to hold that defendant Roper's order of November 18, 1935, was issued not for a public interest but to further the selfish interest of the Conference Lines or Steamship Combination, and to hamper and destroy independent competition by complainant, a non-conference line, and to deprive American exporters of the advantages accruing to them from independent steamship competition.

66. The Court erred in failing to hold that defendant Roper's order of November 18, 1935, was invalid because no shipper had ever made any complaint against complainant or its methods.

67. The Court erred in holding in effect that defendant Roper by the order of November 18, 1935, could lawfully

prevent any independent ocean carrier like complainant from invading the waters of the United States except on condition that it alone of all steamship companies disclose to its competitors its actual busines transactions, designated commodities carried, rates actually charged, and points between which the commodities were carried.

68. The Court erred in failing to hold that the defendant Roper's order of November 18, 1935, was an attempt [fol. 127] to foster and further a shipping monopoly of all steamship owners in the foreign freight service of the United States by stabilizing, freezing, or fixing rate structure by compelling complainant, a non-conference and independent steamship line, to disclose to its competitors enough knowledge of its private steamship business and of actual goods carried by it between named ports at actual rates to enable complainant's competitors, the conference lines or steamship combination, to compete unfairly with and seriously and irreparably injure complainant.

69. The Court erred in failing to hold that the three Commissioners of the United States Shipping Board appointed by the President under the Economy Act, and confirmed by the Senate, continued in office until their successors should be appointed, and that as no such successors have been appointed, they and not the Department of Commerce constituted the United States Shipping Board at the time the defendant Roper's order of November 18, 1935, was issued.

70. The Court erred in failing to hold that Congress itself in one part of the Economy Act undertook to reorganize the Shipping Board and provide for its continued existence through Commissioners to be appointed for fixed terms of years and not removable by the President except for inefficiency or misconduct, and therefore obviously did not intend, by the other part of the same Act relied on by defendants, to authorize the President to do that which it had just done, or provided for, itself.

[fols. 128 & 129] For which errors the appellant, Isbrandtsen-Moller Co., Inc., prays that the said final decree of the District Court of the United States for the Southern Dis-

trict of New York, filed and entered on the 22nd day of May, 1936, in the above-entitled cause, be reversed and a judgment rendered in favor of the appellant and for costs.

Dated, May 22, 1936.

Theodore Kiendl, Counsel for Appellant. Davis, Polk, Wardwell, Gardiner & Reed, Of Counsel.

[fol. 130] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Isbrandtsen-Moller Co., Inc., the complainant in the above entitled cause, for an appeal in the above entitled cause to the Supreme Court of the United States from the judgment of the District Court of the United States for the Southern District of New York, having been filed herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rules 9 and 12 of the Rules of the United States Supreme Court, and the said papers having been presented to this court and the record in this cause having been considered;

It is hereby Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from [fol. 131 & 132] the final decree of the District Court of the United States for the Southern District of New York, entered in this cause on the 22nd day of May, 1936, and that the Clerk of the said District Court of the United States for the Southern District of New York shall within one day from this date make and transmit to the Supreme Court of the United States, under his seal and the seal of the Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or a stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that the said appellant shall give a good and sufficient cost bond in the sum of $250.00, conditioned as required by law.

Done by the Court this 22nd day of May, 1936.

Alfred C. Coxe, United States District Judge.

——, United States District Judge.

[fols. 133-137] Bond on appeal for $250.00 omitted in printing.

[fol. 138] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. Bill of Complaint and Petition of January 3, 1936, with Proof of Service.
2. Order to Show Cause of January 3, 1936, with annexed Affidavit of Hans Isbrandtsen of January 3, 1936.
3. Order (Judge Caffey) setting application for hearing before Judge Bondy.
4. Order (Judge Bondy) setting application for hearing before Circuit Judge Chase and District Judges Patterson and Bondy.

[fol. 139] 5. Cross Motion to Dismiss (January 21, 1936) Notice of.

6. Special Appearance and Cross Motion to Dismiss (January 21, 1936) Notice of, with annexed Affidavit of John F. Davidson, of January 21, 1936.
7. Affidavit of Hans Isbrandtsen of February 18, 1936, with annexed Exhibits A, B, C and D.
8. Affidavit of Harry S. Brown, filed February 14, 1936.
9. Affidavit of Ralph H. Hallett, filed February 14, 1936.
10. Opinion of Court filed.
11. Final Decree.
12. Petition for Appeal.
13. Assignment of Errors.
14. Citation.
15. Bond on Appeal.
16. Order allowing Appeal.
17. Stipulation as to true and complete Record.
18. This præcipe and service thereon.

Said transcript to be prepared as required by law and the rules of this court and the rules of the Supreme Court

of the United States, and to be filed in the office of the clerk of the Supreme Court of the United States, on or before the 23rd day of May, 1936.

Dated, May 22, 1936.

Davis, Polk, Wardwell, Gardiner & Reed, and Theodore Kiendl, Solicitors for Complainant.

[fol. 140] [Endorsed:] Copy received May 22, 1936. Lamar Hardy, Solicitor for Defendant.

[fol. 141] In United States District Court

[Title omitted]

Defendants-Appellees Præcipe for Transcript of Record —Filed June 2, 1936

Sirs:

Please Take Notice that the following papers will constitute the transcript of the record of this Court in this suit to be filed in the Supreme Court of the United States pursuant to an appeal heretofore allowed herein, in addition to the papers included in the Complainant-Appellant's præcipe dated May 22, 1936:

1. Affidavit of Samuel D. Schell.
2. Statement of jurisdiction of the Supreme Court of the United States, pursuant to Supreme Court Rule 12.
3. Proof of service of appeal papers, pursuant to Supreme Court Rule 12.

[fols. 142 & 143] 4. This præcipe and service thereon.

5. Any stipulation the parties may enter concerning correctness of copies of the papers in the transcript of record.

Dated, New York, N. Y., June 1, 1936.

Lamar Hardy, United States Attorney for the Southern District of New York, Solicitor for Defendants.

To Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Solicitors for Complainant, 15 Broad Street, New York, N. Y. The Clerk of the District Court, Southern District of New York.

It is hereby agreed that the complainant's Præcipe dated May 22, 1936, and the Defendant's Præcipe dated June 1,

1936, enumerate all the papers to constitute the transcript of record on appeal to the Supreme Court of the United States in this case.

Davis, Polk, Wardwell, Gardiner & Reed, and Theodore Kiendl, Solicitors for Complainant. Lamar Hardy, U. S. Attorney, Solicitor for Defendant.

Dated, New York, N. Y., June 1, 1936.

So Ordered: Wm. Bondy, U. S. D. J.

[File endorsement omitted.]

[fols.144-152] Citation, in usual form, showing service on Lamar Hardy, Filed May 22, 1936, omitted in printing.

[fol. 153] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 154 & 155] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed August 24, 1936

Come now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated, May 22, 1936.

Theodore Kiendl, Counsel for Appellant. Davis, Polk, Wardwell, Gardiner & Reed, of Counsel.

[fol. 156] [File endorsement omitted.]

Endorsed on cover: Enter Theodore Kiendl. File No. 40,847. S. New York D. C. U. S. Term No. 307. Isbrandtsen-Moller Co., Inc., appellant, vs. The United States of America, et al. Filed August 24, 1936. Term No. 307, O. T. 1936.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 307

ISBRANDTSEN-MOLLER CO., INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

[illegible]
Counsel for Appellant.

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UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ISBRANDTSEN-MOLLER CO., INC.,

Appellant,

against

THE UNITED STATES OF AMERICA, THE DEPARTMENT OF COMMERCE OF THE UNITED STATES, THE SHIPPING BOARD BUREAU OF THE DEPARTMENT OF COMMERCE OF THE UNITED STATES, DANIEL C. ROPER, INDIVIDUALLY AND AS SECRETARY OF COMMERCE OF THE UNITED STATES; JAMES C. PEACOCK, INDIVIDUALLY AND AS DIRECTOR OF THE SHIPPING BOARD BUREAU OF THE DEPARTMENT OF COMMERCE OF THE UNITED STATES, AND LAMAR HARDY, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK,

Appellees.

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The appellant respectfully states as follows:

a. The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States on this appeal is Section 31 of the Shipping Act 1916 (U. S. Code, Title 46, Sec. 830) and U. S. Code, Title 26, Secs. 46 and 47.

b. The order, the validity of which is involved, is the order of November 18, 1935, of the defendant Daniel C.

Roper, Secretary of Commerce, purporting to act as the United States Shipping Board under Section 21 of the Shipping Act 1916 (U. S. Code, Title 46, Sec. 820), reading as follows:

"DEPARTMENT OF COMMERCE,

Office of the Secretary,

Washington.

In the Matter of Filing Rates and Charges by Common Carriers by Water in Foreign Commerce.

ORDER.

It appearing, That full and complete information as to the rates and charges for or in connection with the transportation of certain property from continental United States to points in foreign countries by carriers by water in foreign commerce subject to the Shipping Act, 1916, is necessary to the proper administration of the regulatory provisions of said act;

It further appearing, That Isbrandtsen-Moller Company, Inc., is a common carrier by water in foreign commerce subject to the Shipping Act, 1916;

It is ordered, In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916, that Isbrandtsen-Moller Company, Inc., be, and it is hereby notified and required to file with the Division of Regulation, United States Shipping Board Bureau, of this Department, at its office in Washington, D. C., on or before December 16, 1935, each port-to-port and transhipment rate charged and/or collected by it during the period from September 1, 1935, to November 12, 1935, both dates inclusive, for the transportation of property, except cargo loaded and carried in bulk without mark or count, from all points in continental United States of America to all points in foreign countries; indicated plainly as to each such rate, the place from and to which it was charged and/or collected, the effective date thereof, and the name, in alphabetic order, of each commodity moving thereunder; showing also

each terminal or other charge, privilege or facility, granted or allowed, and any rules or regulations which in anywise changed, affected, or determined any part of any such aforesaid rate, or the value of the service rendered to the consignor or consignee;

It is further ordered, That the aforesaid filing be in printed, typewritten, or mimeographed form, personally subscribed by an officer of said Isbrandtsen-Moller Company, Inc., who shall specify his title and verify the accuracy and completeness thereof under oath;

It is further ordered, That copy of this order be served upon said Isbrandtsen-Moller Company, Inc.

(Sgd.) DANIEL C. ROPER,
Secretary of Commerce.

November 18, 1935."

Executive Order No. 6166 (U. S. Code, Title 5, Section 132), promulgated on June 10, 1933, and effective August 10, 1933, the validity of which is involved in so far as it attempts, in Section 12, to abolish the United States Shipping Board and to transfer its functions to the Department of Commerce reads, so far as material, as follows:

"Whereas section 16 of the act of March 3, 1933 (Public, No. 428, 47 Stat. 1517), provides for reorganizations within the executive branch of the Government; requires the President to investigate and determine what reorganizations are necessary to effectuate the purposes of the statute; and authorizes the President to make such reorganizations by Executive order; and

Whereas I have investigated the organization of all executive and administrative agencies of the Government and have determined that certain regroupings, consolidations, transfers and abolitions of executive agencies and functions thereof are necessary to accomplish the purposes of section 16;

Now, therefore, by virtue of the aforesaid authority, I do hereby order that:

* * * * * * *

The functions of the United States Shipping Board including those over and in respect to the United States Shipping Board Merchant Fleet Corporation are transferred to the Department of Commerce, and the United States Shipping Board is abolished."

The so-called Economy Act, the validity of which is involved, is the Act of Congress of June 30, 1932, Chapter 314, Title IV, Section 104, as amended March 3, 1933, Chapter 212, Title II, Section 16 (U. S. Code, Title 5, Secs. 124, *et seq.*). Section 401 of said Act under title "Declaration of policy" reads as follows:

"The Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accomplished in great measure by proceeding immediately under the provisions of this title.

Accordingly, the President shall investigate the present organization of all executive and administrative agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes:

(a) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;

(b) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;

(c) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purposes;

(d) To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government;

(e) To eliminate overlapping and duplication of effort; and

(f) To segregate regulatory agencies and functions from those of an administrative and executive character."

Section 402 provides:

"When used in this subchapter, the term 'executive agency' means any commission, independent establishment, board, bureau, division, service, or office in the executive branch of the Government and, except as provided in section 126 of this title, includes the executive departments."

Section 403 provides:

"Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 124 of this title, he may by Executive order—

(a) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;

(b) Consolidate the functions vested in any executive agency; or

(c) Abolish the whole or any part of any executive agency and/or the functions thereof; and

(d) Designate and fix the name and functions of any consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof."

Section 405(c) provides:

"All laws relating to any executive agency or function transferred or consolidated with any other execu-

tive agency or function under the provisions of this subchapter, shall, in so far as such laws are not inapplicable, remain in full force and effect, and shall be administered by the head of the executive agency to which the transfer is made or with which the consolidation is effected."

c. The date of the final decree sought to be reviewed is the 22nd day of May, 1936; and the date upon which the application for appeal is presented is the 22nd day of May, 1936.

The nature of the case and of the rulings of the District Court are such as to bring the case within the jurisdictional provisions above mentioned and relied on for the following reasons:

The appellant filed a bill of complaint in the District Court of the United States for the Southern District of New York and made application for an interlocutory injunction before said court convened under Section 31 of the Shipping Act 1916 (46 U. S. Code, Section 830) and under 26 U. S. Code, Sections 46 and 47), enjoining the enforcement of said order on the grounds, among others (1) that it was not the intent of Congress that the United States Shipping Board be abolished and its functions transferred to the defendant Department of Commerce; that it was the pupose of Congress in creating the Shipping Board to create an independent, regulatory board performing quasi-judicial and quasi-legislative functions; and that in passing the amended Economy Act of March 3, 1933, Congress did not intend that the powers of independent regulatory boards such as the Shipping Board be transferred to the executive branch of the government; (2) That Congress has not ratified the purported transfer of the functions of the United States Shipping Board to the defendant Department of Commerce; (3) that even if it

assumed that it was the intent of Congress that the functions of the Shipping Board be transferred to the defendant Department of Commerce, Congress is without authority under the Constitution to do so because the transfer of the regulatory functions of the Shipping Board to the Department of Commerce is not the intention of the well-established principle that the three branches of the Government be kept separate and distinct and because the purported transfer of the regulatory functions of the Shipping Board to the defendant Department of Commerce amounts to an unconstitutional delegation of legislative power; and (4) that the effect of the order of the defendant Roper of November 18, 1935, is to deprive complainant of fundamental rights guaranteed to it by the Constitution because said order deprives complainant of its authority without due process of law and because said order amounts to an unreasonable search and seizure within the meaning of the Fourth Amendment to the Constitution.

Dated, May 22, 1936.

THEODORE KIENDL,
Counsel for Appellant.

DAVIS, POLK, WARDWELL,
GARDINER & REED,
Of Counsel.

Filed June 1, 1936.

FILED
DEC 22 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 307.

ISBRANDTSEN-MOLLER CO., INC.,
Appellant,

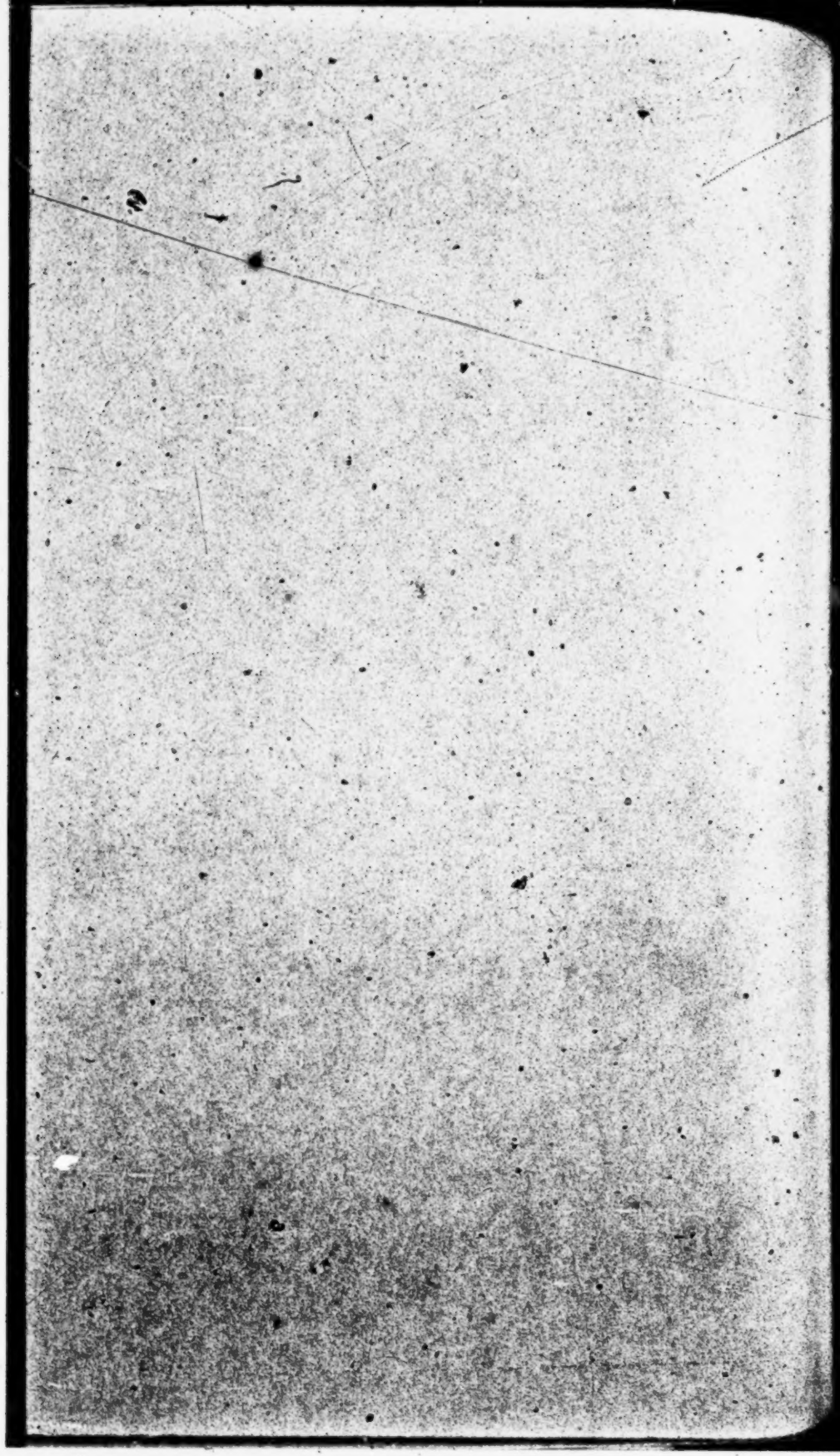
—against—

THE UNITED STATES OF AMERICA, DANIEL C. ROPER, individually and as Secretary of Commerce of the United States, *et al.*,
Respondents.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT ISBRANDTSEN-MOLLER CO., INC.

JAMES W. RYAN,
Counsel for Appellant.



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III. The District Court erred in ignoring this Court's decisions in *Humphreys* v. *United States*, 295 U. S. 602, and *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, that Boards or Commissions like this are not executive agencies, and in holding that the definition of "executive agency" in the Economy Act (U. S. C., title 5, sec. 125) as a bureau or board "in the executive branch of the Government" is ambiguous or includes a Board which has clearly never been "in the executive branch of the Government".

The District Court does not mention, and plainly overlooked, the fact that after finishing with "executive agencies" Congress, in another part of the same Economy Act, proceeded to provide for the permanent continuance of the United States Shipping Board through three Commissioners appointed by the President for fixed terms of years and confirmed by the Senate and not subject to removal or "abolition" excepting for inefficiency or misconduct.

The District Court further erred in resolving a "doubt" whether the Shipping Board was an "executive agency" on the basis of a mistaken assumption that Congress was in session for sixty days after June 10, 1933 (the fact of common knowledge being that Congress adjourned for the Session on June 16, 1933), and on the basis of an assumption that Congress' action in a minute paragraph of two appropriation acts in "providing funds to pay the salaries and expenses" (R. 56) of

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certain employees in the Department of Commerce who were called a Shipping Board "Bureau", and in casually mentioning as mere matter of recital or citation the Shipping Acts and the attacked Executive Order by "number" and "date", constituted a "ratification" of the invalid Executive Order so as to repeal the plain and detailed provisions in the Economy Act that the Shipping Board was to continue permanently as a body entirely outside the executive departments or executive control.

The District Court further overlooked the fact that in the Appropriation Act of June 16, 1933, by appropriating money for salaries of the three Shipping Board Commissioners provided for permanently in the Economy Act, for the fiscal year ending June 30, 1934, Congress plainly invalidated (assuming for purpose of argument it needed invalidating) the Executive Order of June 10, 1933, purporting to give undesignated employees in the Department of Commerce the powers and offices of the Shipping Board Commissioners.

The District Court further overlooked the fact that Section 21 of the Shipping Act, 1916, which is U. S. Code, title 46, section 820, is not mentioned in either of the appropriation acts which it states (R. 56) in its opinion are a "ratification", and yet that is the one under which the Secretary of Commerce attempted to justify his order here involved. The only sections mentioned in those Appropriation Acts are U. S. Code, title 46, sections 804, 805, 861-889, and 891-891-x, all of which relate to mail contracts, construction loan funds and other special matters which might be administered by a bureau in an executive department, but do not include a single section of the Shipping Act, 1916, dealing with regulation or with the quasi-legislative or quasi-judicial functions of the United States Shipping Board..... 42

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IN THE

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OCTOBER TERM, 1936.

No. 307.

ISBRANDTSEN-MOLLER CO., INC.,

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—against—

THE UNITED STATES OF AMERICA, DANIEL C. ROPER, individually and as Secretary of Commerce of the United States, *et al.*,

Respondents.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT ISBRANDTSEN-MOLLER CO., INC.

Opinions Below.

The District Court's opinion (R. 47) is reported as *Isbrandtsen-Moller Co.* v. *United States,* 14 Fed. Supp. 407.

Jurisdiction.

The final decree (R. 58) of the District Court was entered on May 22, 1936. The appeal was allowed on May 22, 1936 (R. 71). The jurisdiction to review the decree complained of, by direct appeal, is conferred by Section 31 of the Shipping Act, 1916 (U. S. C., Title 46, Sec. 830), Section 208 of the Judicial Code (U. S. C., Title 28, Sec. 46), and the

Act of October 22, 1913, Chapter 32 (U. S. C., Title 28, Secs. 43, 44, 45 and 47).

Probable jurisdiction was noted by this Court on October 12, 1936.

Statement of the Case.

This is an appeal from a final decree of the District Court for the Southern District of New York denying appellant's motion for an injunction, and granting the motion of the respondent Secretary of Commerce and of the respondent United States of America to dismiss the complaint for failure to state facts sufficient to constitute a cause of action. No answer to the complaint has been filed by any of the respondents.

The motion for an injunction and the motion to dismiss were heard on February 15, 1936. In support of its motion for an injunction the appellant filed two affidavits of Hans Isbrandtsen (R. 18, 23). The respondents submitted affidavits in opposition of H. S. Brown (R. 37), S. D. Schell (R. 42), and R. H. Hallett (R. 45).

Certain respondents other than the Secretary of Commerce and the United States of America moved to quash process, and filed an affidavit of J. F. Davidson (R. 22). The motion to quash as to them was granted, and no error is urged with reference to it.

The complaint seeks an injunction to restrain the enforcement of an order issued by the respondent Secretary of Commerce purporting to act as the United States Shipping Board under Section 21 of the Shipping Act, 1916.

The Order of the Secretary of Commerce.

The order dated November 18, 1935 (R. 5), requires the appellant to produce and file on December 16,

1935, with the Secretary of Commerce a copy or summary of its books and records showing for the period from September 1st to November 12th, 1935, all commodities it has carried from the United States to foreign countries, specifying each commodity by name, and stating the point of shipment, point of destination, and freight rate charged or collected on each commodity, together with the effective date of the rate. The copy or summary must further show each transshipment rate charged, and the same particulars with respect to it, and also each terminal or other charge, together with all rules affecting the rates or the value of the services rendered.

The order is entitled "In the matter of filing rates and charges by common carriers by water in foreign commerce". It recites that it appears that full information as to rates in connection with transportation "of certain property" from the United States to foreign countries "by carriers by water in foreign commerce subject to the Shipping Act, 1916, is necessary to the proper administration of the regulatory provisions of said act" (R. 5), and that Isbrandtsen-Moller Co., Inc. is a common carrier by water in foreign commerce.

The order states that it is issued "In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916" (R. 5). It is signed by "Daniel C. Roper, Secretary of Commerce" (R. 6).

"Department of Commerce, Office of the Secretary,
Washington

In the Matter of Filing Rates and Charges
by Common Carriers by Water
in Foreign Commerce

Order

It appearing, That full and complete informa-

tion as to the rates and charges for or in connection with the transportation of certain property from continental United States to points in foreign countries by carriers by water in foreign commerce subject to the Shipping Act, 1916, is necessary to the proper administration of the regulatory provisions of said act;

It appearing further, That Isbrandtsen-Moller Company, Inc., is a common carrier by water in foreign commerce subject to the Shipping Act, 1916;

It is ordered, In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916, that Isbrandtsen-Moller Company, Inc., be, and it is hereby, notified and required to file with the Division of Regulation, United States Shipping Board Bureau, of this Department, at its office in Washington, D. C., on or before December 16, 1935, each port-to-port and trans-shipment rate charged and/or collected by it during the period from September 1, 1935, to November 12, 1935, both dates inclusive, for the transportation of property, except cargo loaded and carried in bulk without mark or count, from all points in continental United States of America to all points in foreign countries; indicating plainly as to each such rate, the place from and to which it was charged and/or collected, the effective date thereof, and the name, in alphabetic order, of each commodity moving thereunder; showing also each terminal or other charge, privilege or facility, granted or allowed, and any rules or regulations which in anywise changed, affected, or determined any part of any such aforesaid rate, or the value of the service rendered to the consignor or consignee;

It is further ordered, That the aforesaid filing be in printed, typewritten, or mimeographed form, personally subscribed by an officer of said

Isbrandtsen-Moller Company, Inc., who shall specify his title and verify the accuracy and completeness thereof under oath;

It is further ordered, That copy of this order be served upon said Isbrandtsen-Moller Company, Inc.

(Sgd.) DANIEL C. ROPER,
Secretary of Commerce.

November 18, 1935."

Grounds Specified as Basis for the Order.

At the hearing in the District Court counsel for the Secretary of Commerce submitted affidavits of Harry S. Brown (R. 37) and Samuel D. Schell (R. 42) to show the grounds on which the order was based.

Affidavit of H. S. Brown.

The affidavit of Harry S. Brown (R. 37), Chief of the Division of Regulation in the Shipping Bureau set up by the respondent Secretary of Commerce, specifies the grounds of the order as follows:

(1) Because the Secretary of Commerce is by the Shipping Act, 1916, "charged with the duty to see to it that no common carrier by water violates the Act by making or giving any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever" (R. 37);

(2) Because the Secretary of Commerce is by that Act charged with the duty to see to it that no common carrier by water "subjects any person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (see Sec. 16 of said Act)" (R. 38);

(3) Because the Secretary of Commerce is by that Act charged with the duty to see to it "that no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors (see Sec. 17)" (R. 38);

(4) Because the Secretary of Commerce "is also charged with the duty of investigating the relative cost, advantages and disadvantages of operating in the foreign trade vessels under United States registry and under foreign registry (see Sec. 12 of said Act)" (R. 38);

(5) Because the Secretary of Commerce "is under a duty to sell, as soon as possible, all of the merchant vessels owned by the United States, and, in order to accomplish this purpose, is specifically charged with keeping himself informed as to the sale price of vessels in the domestic and foreign market, the available supply of vessels and the demand for the same, existing freight rates and prospects of their maintenance (see Sec. 5 of the Merchant Marine Act, 1920)" (R. 38);

(6) Because "In order to carry out the purposes of the said Acts and to perform the many functions and duties placed upon the Secretary of Commerce, he has found it necessary to require the submission to him by common carriers by water engaged in foreign commerce of schedules of rates and charges actually made for the transportation of property" (R. 38);

(7) Because "Inasmuch as under the provisions of the law, shippers and localities are given a specific

interest in determining whether any undue preference or advantage is being granted any shipper or locality to the disadvantage of some other shipper or locality, it has been incumbent upon the Secretary of Commerce to make all such information as gathered by him concerning rates and charges public" (R. 38);

(8) Because the Secretary of Commerce issued the order under Section 21 of the Shipping Act, 1916, "for the purpose of carrying out the provisions of the aforesaid Acts" (R. 39) "only after failing to persuade that Company (appellant) to file its regular rates" (R. 39);

(9) Because other carriers which are "members of conference agreements" (R. 39), and an undisclosed number of other carriers not members of conference agreements have filed "Schedules" of rates to be charged, and the Secretary of Commerce has "given full publicity" to those schedules (R. 39);

(10) Because "One of the purposes sought to be accomplished by the issuing to the complainant of the order in question" (R. 40), "was to determine whether or not the complainant was in fact maintaining a schedule of rates which were applicable on equal terms to all shippers or whether the complainant was charging different rates to different shippers for transportation of the same classification of freight" (R. 40);

(11) Because "Under Section 15 of the Shipping Act, 1916 (46 U. S. C., Sec. 804), Congress recognized the propriety of common carriers by water combining together for the purpose of stabilizing rates and other practices and excepted such combinations from

the provisions of the law commonly known as the Sherman Anti-trust Act and the Clayton Act, providing that the contracts, agreements and other memoranda creating such combinations were kept on file with the Government and were approved by the Government" (R. 40-41); "The experience of the Government has been that the existence of the conference agreements results in greater stabilization of rates and practices affecting foreign commerce * * *. With respect to many of the agreements, carriers engaged in the particular route are given the privilege of participating in contracts which have been signed by members of the conference with particular shippers regarding rates, in return for an undertaking that such carriers will comply with the rates, rules and regulations of the conference, even though not becoming members" (R. 41);

(12) Because "While there are many foreign shipping companies and American shipping companies owning or operating foreign flag ships who are members of the conferences, the sailings of vessels flying the United States flag are in the majority of the conferences so numerous as to compare favorably with those of any other particular nation" (R. 41); and

(13) Because "The control by the Government of the conferences in which there are no members who are citizens of the United States using vessels flying the United States flag has been most advantageous to the exporters and importers of the United States and has been one of the most potent methods of preventing rate wars which almost always result ultimately in excessive freight rates" (R. 41-42).

Affidavit of S. D. Schell.

The affidavit of Samuel D. Schell (R. 42) specifies an additional ground on which the order was based as follows:

(14) Because "The Secretary of Commerce as the successor of the United States Shipping Board, is now maintaining and operating a small number of said steamship lines which are still considered necessary to accomplish the purposes of said Act (Merchant Marine Act, 1920) and for which purchasers have not yet been procured. * * * The said steamship lines are operated in competition with steamship lines owned by foreign companies * * *. The United States Shipping Board and the Secretary of Commerce, as its successor, has authorized and encouraged the said private corporations acting as agents (of the Secretary of Commerce) in managing and operating the steamship lines owned by the United States to become members of Conferences approved as required by Section 15 of the Shipping Act, 1916 (46 U. S. C. 801, *et seq.*) for the purpose of stabilizing rates and other practices obtaining in the particular routes which are served by said steamship lines" (R. 43-44).

The Complaint.

The complaint (R. 3), sets forth five causes of action.

The first is that the order of the Secretary of Commerce, purporting to act as the Shipping Board, is invalid because Congress did not intend by the Executive Department Reorganization Act of 1932 to authorize the President to abolish the Shipping Board and transfer its functions to an executive officer such as the Secretary of Commerce; and that if Congress

had so intended the Reorganization Act of 1932 would be unconstitutional in attempting to make the active head of an Executive Department also a judicial officer and a legislative officer of the United States, and in failing to set up an "adequate declaration of policy or standard of action", and in that the President promulgated the order of transfer without adequate hearings and findings of fact on which to base it.

The second cause of action (R. 12) is that the order of the Secretary of Commerce is invalid because it is in substance an attempt by one of appellant's competitors to "regulate" or "stabilize" appellant's rates, and also compel appellant to charge rates fixed by a shipping monopoly of which that competitor of appellant is a member. It is alleged that before the order was issued the Secretary of Commerce had transferred all his Shipping Board functions to the defendant Peacock who was the President of a private steamship corporation which was actively operating vessels in the same trade in competition with those of appellant, and which was a member of a conference or shipping combination whose interests were opposed to those of an independent or non-conference company like appellant and for whose financial benefit the order complained of had been issued, and that "the separation of powers between the legislative, judicial and executive branches of the Government and the Due Process Clause of the Fifth Amendment to the Constitution of the United States prohibit the exercise of regulatory or quasi-judicial functions such as were entrusted to the United States Shipping Board, 1916, by persons or agencies having interests as above set forth, and therefore render null and void the said order of November 18, 1935" (R. 13).

The third cause of action (R. 13) is that the order of the Secretary of Commerce was issued, not for a

public purpose authorized or designated by Congress, but in furtherance of a concerted plan of respondents to compel an independent or non-conference carrier like appellant either to join a conference or shipping monopoly or else to suffer serious damage from disclosure to its competitors of its current private business records and rates charged and commodities moved which were required by the Secretary of Commerce's order to be filed with him. It is further alleged that the Secretary of Commerce's order was issued to promote and foster a shipping monopoly of appellant's competitors.

The fourth cause of action (R. 14) is that the order of the Secretary of Commerce is an unjust discrimination against the appellant, contrary to the due process clause of the Fifth Amendment to the Constitution of the United States, because it requires appellant to file a record of its actual transactions showing the rates which it had just charged on particular goods between named ports, whereas the only order issued by the Secretary of Commerce to appellant's competitors, the Conference Lines or shipping combination, requires merely the filing of general rate schedules in the future which are not always adhered to, and which need not be adhered to under any law or government regulation. It is also alleged that the order of the Secretary of Commerce to appellant was issued under Section 21 of the Shipping Act, 1916, violations of which carry a heavy penalty, whereas the "order" issued by the Secretary of Commerce to appellant's competitors was not issued under Section 21 or any other section of the Shipping Act, 1916, and carried no penalties for non-observance, and called only for information which those competitors were already required by law (Section 15, Shipping Act, 1916) to file, because of their having joined together in a conference or shipping combination.

The fifth cause of action (R. 15) is that enforcement of the order should be enjoined because shortly after it was issued the Secretary of Commerce rejected appellant's offer to file its recent records as demanded, on condition that they would not be turned over to appellant's competitors so as to cause serious damage to appellant; and because the Secretary of Commerce thereupon, by stating that his purpose in issuing the order was to turn appellant's records over to the public, supplemented the order so as in effect to require appellant to keep its competitors (the conference lines or shipping combination) informed of all business being transacted by it as an independent steamship company, thus enabling them to compete unfairly and ruin appellant's business. It is further alleged that there is no way in which appellant can comply with the order without prejudicing or losing its equitable, legal and constitutional rights.

Affidavits of Hans Isbrandtsen.

The affidavit of Hans Isbrandtsen, President of appellant, dated January 3, 1936 (R. 18), states that the enforcement of the order of the Secretary of Commerce against appellant, and the collection of the penalties, will cause serious injury to and possible destruction of appellant's business by divulging to appellant's competitors its current trade and rate transactions, and other private business information as just recorded in appellant's books, and will also, for the other reasons set forth in the complaint, cause irreparable injury to appellant.

The affidavit of Hans Isbrandtsen dated February 18, 1936 (R. 23) states:

That the facts and appellant's position with respect to the order of the Secretary of Commerce are cor-

rectly stated in Exhibit A (R. 28A), Exhibit B (R. 28B), and Exhibit C (R. 28C) annexed to the affidavit;

That H. S. Brown, the assistant to the Secretary of Commerce on whose affidavit (R. 37) the respondents rely as stating the specific grounds on which the order of the Secretary of Commerce was based, stated, or admitted to appellant's president orally in the presence of witnesses that the order was issued only for the purpose of turning over the information, consisting of appellant's records, to "two of complainant's competitors, namely, the Black Diamond Line and the Dollar Line, both of whom are members of steamship conferences or combinations actively competing with complainant" (R. 24); and that at another time H. S. Brown admitted or "stated in writing that the purpose of the Shipping Board Bureau in investigating the rates and business of non-conference lines was to benefit the conference lines" (R. 24).

That "Congress has never intended in the Shipping Act of 1916 or otherwise to require independent or non-conference steamship lines to join the so-called conference or shipping monopoly, Congress having intended to leave it as a purely voluntary matter whether or not a steamship line wished to join such a conference, but requiring that if it did join such a conference thereby violating the Sherman Anti-Trust Act, it would be required by Section 15 of the Shipping Act of 1916 to file its rates with the United States Shipping Board or otherwise be subjected to the penalties and prosecutions under the Sherman Anti-Trust Act because of furthering a shipping monopoly" (R. 24);

That "complainant has a legal right to carry on its business in United States waters as an independent or non-conference steamship line without being compelled by harassment, by a government bureau or

otherwise, to join the conference or shipping monopoly" (R. 25);

That "the only proper economical and sound method of carrying on the steamship business is to do as complainant has been doing, namely, keep apart from shipping monopolies or conferences and afford to American shippers and exporters such a reliable, regular and economical service as an unsubsidized and efficient steamship line can render so as to enable American goods to reach foreign ports and markets at economical cost of transportation and thereby effectually compete with foreign sellers sending goods competitively to such foreign markets for sale" (R. 25).

That "such schedules of rates as have been filed by other carriers with the Shipping Board have been filed by carriers who are members of a conference or shipping monopoly and are required by Congress by Section 15 of the Shipping Act of 1916 to file such rates as a condition to not being prosecuted under the Sherman Anti-Trust Act" (R. 25);

That "Congress by the Shipping Act intended that only common carriers in interstate commerce, as distinguished from foreign commerce, should be required to file their rates with the Shipping Board, as is evident from Section 19 of the Shipping Act of 1916" (R. 25);

That "neither the Shipping Act of 1916 nor any other act of Congress requires such carriers as have filed their schedules of rates with the Shipping Board as members of a conference or shipping monopoly, to actually observe those rates, or has given the Shipping Board any power to compel them to do so, and deponent is informed and believes that in many instances such schedules of rates are in fact not observed by the conference lines or shipping monopoly, and that Harry S. Brown, whose affidavit has been filed by

defendants herein, simply is not sufficiently familiar with the actual practices in the steamship business of said conference lines to make a statement of his own knowledge" (R. 25);

That the order of the Secretary of Commerce "is in substance an effort by a competitor of complainant to regulate complainant's business and drive it from business as an independent or non-conference operator and compel it to join the shipping monopoly or conference as is plainly evident from the affidavit filed herein by Samuel D. Schell, dated January 27, 1936, and from the affidavit of Harry S. Brown, filed herein, dated January 25, 1936. The defendants Roper, Secretary of Commerce, and James C. Peacock are actively and directly competing with complainant in the same trades through exercising the functions of the United States Shipping Board Merchant Fleet Corporation (which deponent is informed was organized as a private corporation under the general laws of the District of Columbia for the purpose of engaging in the steamship business for profit as an operator of merchant steamships), and instances of this appear from several written steamship agreements signed by said defendants, and a true and complete copy of one of which is annexed hereto, marked Exhibit D" (R. 26);

That "So far as the purpose of regulating or stabilizing rates is concerned, which is stated at the end of the affidavit of Samuel D. Schell, and which is also stated as the purpose of the Shipping Board Bureau at page 6 of the affidavit of Harry S. Brown filed herein, deponent has taken the advice of counsel and is informed and believes that neither the United States Shipping Board nor the Department of Commerce has ever been authorized by Congress to regulate or stabilize rates in the foreign commerce of the

United States, the United States Shipping Board's authority in that respect being expressly restricted in the Shipping Act of 1916, Section 19, to requiring the filing of maximum rates in interstate commerce and being restricted by the inter-coastal act of June, 1933 to requiring the filing of schedules of rates in inter-coastal commerce. The affidavits of Samuel D. Schell and Harry S. Brown filed herein now disclose clearly and definitely that the Order of November 18, 1935 of defendant Roper is a palpable attempt to exercise a power of rate filing and regulation in the foreign commerce of the United States which Congress has repeatedly declined to confer on the United States Shipping Board or its alleged successor" (R. 26);

That "until the Order of November 18, 1935 was issued by defendant Roper, no nation in the history of the world had ever before attempted to regulate freight rates in foreign commerce from or to such nation" (R. 26); and

That "such attempt at rate regulation in foreign commerce by one nation would be impossible in practice and would inevitably result in disruption of international shipping by counter rate regulation by each nation against the other" (R. 27).

Exhibit A to Mr. Isbrandtsen's Affidavit.

Exhibit A (R. 28A), annexed as part of the affidavit of Hans Isbrandtsen, states:

That "The important fact is that the Conference Lines who attack us are mostly foreign lines. In almost all of the conferences a majority of the lines, both in number and tonnage are foreign. This shows the absurdity of suggesting that there is any national interest in stabilizing freight rates at a high level. Such a course would merely place an additional bur-

den on the foreign trade of this country for the benefit primarily of foreign ship owners" (R. 28A);

That the purpose of the Conference Lines "is to eliminate competition altogether" (R. 28A);

That if rates are "stabilized", the shippers and public must pay to all lines the rate at which the least efficient line can be operated" (R. 28A);

That appellant receives "no governmental aids or subventions of any character" (R. 28A);

That appellant's business "is not based upon rate-cutting and we do not operate at a loss" (R. 28A).

Exhibit B to Mr. Isbrandtsen's Affidavit.

Exhibit B (R. 28B), annexed as part of the affidavit of Hans Isbrandtsen, states:

That "In the North Atlantic trade and the Far East trade, the Conference Lines have almost a complete monopoly. If our company can be brought into line, the Conference Lines will be within sight of their goal, which is a 100% monopoly of American foreign freight service" (R. 28B);

That appellant is "an independent line which operates successfully without any aid from any government" (R. 28B);

That "The Shipping Board Bureau has made no secret of the fact that it supports the conference lines" (R. 28B);

That "the conference contract system with its penalties, etc., in the foreign trade" is the same system that has been declared illegal by the Government "in the intercoastal trade" (R. 28B);

That "no shipper has ever made any complaint of this line [appellant] or its methods" (R. 28B);

That "the conference lines, both in number and tonnage, are predominantly foreign" (R. 28B);

That the stated purpose of the conference lines is

"to monopolize transportation of American foreign commerce" (R. 28B);

That "many of the foreign steamship companies which operate a service from this country also operate a service to the same foreign markets from their own country" (R. 28B);

That in none of the exporting countries competing with American export trade is the information demanded in the order of the Secretary of Commerce required to be filed or made public (R. 28B);

That appellant, although using foreign ships, is "an American company, and we have no interests excepting in American foreign commerce" (R. 28B).

Exhibit C to Mr. Isbrandtsen's Affidavit.

Exhibit C (R. 28C), annexed as part of the affidavit of Hans Isbrandtsen, states:

That the order of the Secretary of Commerce "is not in accord with the functions of the Department of Commerce. The functions of the Department of Commerce are to promote foreign commerce and to maintain an open international market, by the free and unobstructed movement of goods at economical transportation cost. Further, the Bureau's attitude seems influenced too much by the selfish interest of the steamship combinations to which our competitors in the steamship trade belong and very likely also by the Bureau's own interest in the operation of its ships in combination with others" (R. 28C);

That the order of the Secretary of Commerce requires appellant "to disclose our private trade information to our competitors (although we are not unwilling that the Department should have it for its own information if it would agree to accept it on that condition)" (R. 28C);

That the order requires appellant "to throw open to the world at large trade data that many of our customers reasonably expect be kept private" (R. 28C);

That appellant takes "no part in monopoly or combination with others, or what might border thereon" (R. 28C), and renders economical transportation service to exporters and importers without coercion of any sort (R. 28C);

That appellant does not receive any of the benefits or special privileges which its competitors, the Conference Lines, have obtained by combination or monopoly, and that appellant's competitors are subject to regulation (such as by the order here involved of the Secretary of Commerce) because of having obtained such benefits and privileges of monopoly at the expense of American shippers in consideration of agreeing to such regulation (R. 28C);

That the practical effect of the order of the Secretary of Commerce is "to force an independent steamship company to join such a combination or to observe the practices of combinations or their fixed or frozen rates" (R. 28C).

That the effect of the order of the Secretary of Commerce is to prevent the maintenance of an open market in American foreign trade and to destroy independent steamship service (R. 28C);

That "up to this time American national shipping policy has always been formulated by Congress or a regulatory and quasi-judicial body, and not by a Bureau head. And that policy heretofore has followed the overwhelming national interest in maintaining the rights of American exporters and shippers generally to have access to the world freight market by maintaining the principle of free competition in transportation service in the foreign trade" (R. 28C); and

That there is no legal authority for "the one man dominating the Bureau to function as a regulatory or quasi-judicial body like the former Shipping Board Commission" (R. 28C).

Exhibit D to Mr. Isbrandtsen's Affidavit.

Appellant operates steamships between United States ports and foreign ports in competition with steamships owned and operated by the Secretary of Commerce (representing the United States) and his agents (R. 26).

Exhibit D (R. 29), annexed as part of the affidavit of Hans Isbrandtsen, is an Operating Agreement entered into on October 4, 1935, between the Secretary of Commerce "acting by and through the United States Shipping Board Merchant Fleet Corporation" (R. 29) and Cosmopolitan Shipping Company, Inc., of Delaware. The agreement provides that the Secretary of Commerce (representing the United States), as owner of the line of steamships "known as the America France Line, operating on berth service between United States Atlantic ports" and French ports, allocates five named steamships to be operated by the Cosmopolitan Company as Managing Agent for the Secretary of Commerce. The Secretary of Commerce has the right of "removal of any of" the employees on board his vessels, and the crews of the vessels are to be obtained through "the Department of Commerce" (R. 30). The maintenance and voyage repairs of the vessels are regulated, supervised and inspected as required by the Secretary of Commerce (R. 30). No repairs or expenses can be incurred except in serious emergency, without authority in writing from the Secretary of Commerce (R. 30).

The Cosmopolitan Company as "managing agent"

shall account to the Owner for all monies collected by it or its subagents or monies disbursed by its subagents" (R. 31).

"All business shall be carried on in the name of the said Line, for the account of the Owner" (R. 31).

"All traffic contracts shall be for the account of the Owner" (R. 31).

All books of account and vouchers "shall be the property of the Owner" (R. 31).

The books of all agencies of the Cosmopolitan Company shall be "accessible to the Owner to the extent of determining the profits made from transactions with the Line" (R. 32).

The Owner (the Secretary of Commerce) shall provide the insurance on the vessels (R. 32).

The Secretary of Commerce agrees to pay compensation to the Cosmopolitan Company as his managing agent for "the services rendered" (R. 32) of a lump "sum of $11,250.00 per calendar month" (R. 32) and three per cent. of the gross revenue "earned by the Line" (R. 32) and twenty-five per cent of the "net profits earned by the Line" (R. 33). "Net profit shall be computed on terminated voyages" (R. 33). If "conditions" change, the compensation shall be readjusted "and the decision of the Owner shall be final" (R. 33-34).

The "trade name under which a line or route is operated with vessels of the Owner" shall "not contain the name of the Managing Agent, and such trade name shall remain the property of the Owner" (R. 35).

"The Managing Agent shall not be permitted to operate * * * foreign flag vessels * * * or operate any vessels in competition with vessels allocated to the Managing Agent hereunder" (R. 35).

"Any question arising under the agreement shall be referred to the President of the Merchant Fleet Cor-

poration for determination, and his decision shall be final" (R. 36).

The agreement is signed:

"United States of America, by Secretary of Commerce, by United States Shipping Board Merchant Fleet Corporation, by J. C. Peacock, President (Seal).

Attest: S. D. Schell, Secretary.

Cosmopolitan Shipping Company, Inc., by A. F. Mack, President (Seal)" (R. 36).

Affidavit of R. H. Hallett.

The affidavit of R. H. Hallett (R. 45), assistant counsel in the Department of Commerce, states that on January 15, 1936, he requested from the Chief Clerk of the Department of Commerce "a certified copy of any order or orders issued by the Secretary of Commerce setting up the organization to administer the functions of the United States Shipping Board" (R. 45), and that "Pursuant to said request, I received the certified copy of an order which is attached hereto" (R. 45), and which consists of an intra-departmental order or memorandum (R. 46-47), dated August 9, 1933, of the Secretary of Commerce stating that certain employees in his department are to be known as a "Bureau" which "will be under the jurisdiction of Assistant Secretary Mitchell" (R. 46); that incoming correspondence "shall be routed in the usual Departmental manner" (R. 46), excepting that

"matters which will require action by the Secretary of Commerce involving major policies, shall be immediately forwarded to Assistant Secretary

Mitchell for transmission to the Secretary of Commerce. Correspondence or letters relating to such matters shall be prepared under the direction of Assistant Secretary Mitchell for signature of the Secretary of Commerce.

If the Secretary of Commerce *deems it advisable he may refer* any questions to an Advisory Committee for its advice. Said Advisory Committee will include in its membership *the present members of the Shipping Board.* It will receive the reports of any examiners appointed to investigate facts in connection with any proposed exercises of authority, and will report to the Secretary. The Advisory Committee will also advise the Secretary, if he so desires, as to the assignment of any matter to examiners for investigation and report.

(Signed) DANIEL C. ROPER,

Secretary of Commerce"

(R. 46-47). (Italics ours.)

Opinion of the District Court.

The opinion of the District Court states (R. 53-57):

That the Executive Department Reorganization Act of 1932, in order to reduce expenses and increase efficiency, authorized the President, after investigation and findings, to consolidate the functions of "executive agencies", or abolish any executive agency, or transfer any executive agency to the control of any other executive agency (R. 54);

That an executive agency is defined to be "any commission, independent establishment, board, bureau, division, service or office in the executive branch of the Government" (R. 54);

That any order of transfer or consolidation was to

be "submitted to the Congress while in session and shall not become effective until the expiration of sixty calendar days after such transmission" (R. 54);

That the President issued an order abolishing the Shipping Board and transferring its functions to the Secretary of Commerce;

That the recital in the order of transfer that hearings had been held and findings made establishes that the hearings were held and the findings made notwithstanding there is no evidence of those facts (R. 57);

That although "it is doubtful" (R. 55) whether the United States Shipping Board of seven Commissioners created by the Shipping Act, 1916, was an executive agency (R. 55), and although "It would appear more nearly correct to have considered it a board of specially selected members with neither political nor executive functions whose duties were quasi-judicial and quasi-legislative like those of the Federal Trade Commission (R. 55), that doubt "must be resolved against the complainant in view of the fact that after the order had been promulgated Congress adopted the construction thus given the Act"

> (1) "by permitting the order to become effective after notice to it" (R. 55); and
>
> (2) "by passing the Department of Commerce Appropriation Act (48 Stat. 546-566) providing funds to pay the salaries and expenses of that Department, *inter alia*, 'To carry out the provisions of the Shipping Act of 1916, as amended, and the Merchant Marine Acts of 1920 and 1928, as amended (U. S. C. A. title 46, secs. 804, 805, 861-889); * * *; Executive Order numbered 6166, June 10, 1933 * * *.' Again on March 22, 1935 it provided funds for the same department for another fiscal year using similar language. We

> think all this amply shows that Congress intended to confer upon the President authority to abolish the Shipping Board and transfer its functions to the Department of Commerce" (R. 55-56).

That Congress had the power,

(1) to delegate or grant to an executive of the Department of Commerce the powers as a quasi-judicial and quasi-legislative body "of specially selected members with neither political nor executive functions" (R. 55) which the United States Shipping Board of seven commissioners possessed under the Shipping Act, 1916 (R. 56), because

> (a) Congress "did not confer upon anyone functions it was bound to keep and exercise for itself" (R. 57); and
>
> (b) "there was no failure to preserve the required separation of governmental powers."

That the order of the Secretary of Commerce does not constitute unjust discrimination against appellant notwithstanding other steamship companies have not been subjected to a like order (R. 57). The only reason for this conclusion is that "It is alleged (in the bill) that this complainant is in a different situation from those against whom a different order was issued" (R. 57); "There is no showing that there has been any arbitrary or intentionally unfair discrimination against this complainant in favor of others in like situation" (R. 57).

That the daily penalty to which the order of the Secretary of Commerce subjects the appellant is insufficient to show "irreparable injury" (R. 57).

Based on the foregoing statements the District Court concludes:

> "Motion for an injunction denied and bill dismissed" (R. 57).

Final Decree.

The Final Decree (R. 58) of the District Court provides:

That the motion for an interlocutory injunction until entry of the final decree is denied (R. 58);

That the motion of James C. Peacock and certain other respondents (not including the Secretary of Commerce or the United States) to dismiss as to them for want of jurisdiction or venue is granted (R. 58); and

That the motion of the respondents Secretary of Commerce and United States of America "to dismiss the complaint for failure to state facts sufficient to constitute a cause of action" is granted (R. 58-59).

Specification of Errors Relied Upon.

Under Point I of this brief: Assignments of error Nos. *50* (49, 63, 65, 68; 52, 67, and 68);

Under Point II: Assignments Nos. *10* (51, 39, 40, 44, 43, 45, 46, 47, 48, 49, 54, and 55);

Under Point III: Assignments Nos. *1* (2, 3, 4, 11, 13, 18, 70, 20, 22, 23, 24, 25, 26, 27, 30, 38, 53, 56, 59, 61, 62, 63, 64, 65, and 69);

Under Point IV: Assignments Nos. *5* (6, 7, 19, 28, 29, 31, 32, 33, 34, 35, and 36); and

Under Point V: Assignments Nos. *9* (8, 37, 55, and 66).

POINT I.

The order of the Secretary of Commerce is invalid as an attempt to regulate or "stabilize" freight rates in *foreign* commerce. Congress has expressly restricted his (or the Shipping Board's) power of rate regulation to *interstate* and *intercoastal* commerce.

The attempt to regulate consists in requiring the filing of a carrier's (appellant's) current records of actual rate transactions and of designated commodities carried between named places, together with the "date" each rate was charged, and in the Secretary of Commerce giving such records "full publicity" (R. 7, 39).

This Court has recently considered the practical effect which "publicity" of business transactions has in regulating and restraining commerce.

In *Sugar Institute* v. *United States*, 297 U. S. 553, 585, this Court said:

> "Defendants concede the correctness of the statement of the trial court that if immediate publicity had been given to prices and terms in all 'closed transactions', competitive pressure would have been so great that the refiners 'would either have had to abandon the discriminatory concessions or extend them to all'. They concede that it is 'publicity' that prevents such concessions and 'not the sequence in time between the sale and the publicity'."

The Secretary of Commerce's statement (R. 7) that publicity is to be given to the rates which his order requires the appellant to file with him, deprives appellant of reasonable opportunity to carry on an

independent steamship business by making the deviations in rate which open and fair competition with the conference lines or steamship combination might require or justify.

This long-continued practical interpretation of the statute by the Board charged with the duty of executing it, has the force of law. *Kern River Co.* v. *United States,* 257 U. S. 147; *First Nat. Bank* v. *Missouri,* 263 U. S. 640, 658; *Swendig* v. *Washington Water Power Co.,* 265 U. S. 322. And that interpretation, continued through nineteen years, and through many changes in personnel of the Board, is that it has no power to issue orders like the present one for the purpose of regulating or stabilizing rates in foreign commerce, either by "publicity" of seized rate-records and commodity-movement transactions of individual companies, or otherwise.

Congress has never granted the Shipping Board any power of rate regulation in foreign commerce. The Shipping Act, 1916, Section 18 (U. S. C., Title 46, Sec. 817), granted the Board power of rate regulation, to the extent of fixing maximum rates, in *interstate* commerce, and the Intercoastal Shipping Act, 1933 (U. S. C., Title 46, Sec. 844), granted it power of rate regulation in the *intercoastal* trade, but Congress has steadfastly declined to grant it power over rates in foreign commerce. And the present order of the Secretary of Commerce of November 18, 1935, is the first attempt that has been made by the Shipping Board since the Shipping Act, 1916, was enacted, to assert any power of rate regulation, "stabilization" or fixing in foreign commerce.

Evidently what happened is that in the year 1933 the Shipping Board, dissatisfied with being able under

the Shipping Act, 1916, and the Merchant Marine Act, 1920, to regulate or fix rates merely in *interstate* commerce, applied to Congress for an extension of that power in other fields, but it was denied by Congress excepting to the extent of extending the Board's power over rates to *intercoastal* commerce. Then some ingenious employee of the Board or of the Secretary of Commerce conceived the idea (embodied in the order here involved of the Secretary of Commerce dated November 18, 1935) of using old Section 21 of the Shipping Act, 1916, for the illegitimate and unheard-of purpose of establishing rate regulation by the Board in *foreign* commerce despite Congress' refusal to grant it. A comparison of Section 2 of the Intercoastal Act, 1933 (quoted in the Appendix to this Brief) with the order of the Secretary of Commerce of November 18, 1935, shows that the order was drafted by copying or paraphrasing the Intercoastal Act, 1933, rate-regulation provisions, substituting "foreign" commerce for "intercoastal" commerce. This was clearly done without any Congressional authority whatever, and constitutes a perversion of the use which Section 21 was intended by Congress to serve. Section 21 was intended merely to grant to the Board subpoena power for production of records, reports, information, etc., to be exercised after complaint filed against a carrier for an alleged violation of one of the Shipping Act's prohibitions, and to be exercised in aid of the Board's power as the judicial officer or body hearing and determining the merits of the complaint. It was never intended to be used to support a mere "fishing expedition" in the absence of any complaint or proceeding whatever.

Indeed any power of rate regulation in foreign commerce would be inconsistent with the duties of a

partisan nature imposed by Congress on the Shipping Board so far as foreign commerce is concerned. The Board was created and organized with the primary duty in foreign commerce of advancing the interest of American shipowners, and this was made still more explicit in the Merchant Marine Act, 1920 (U. S. C., Title 46, Sec. 861), that "the primary end to be attained" by it was "to develop and encourage the maintenance" of an American "merchant marine". Another "primary" duty was imposed on the Board in the Shipping Act, 1916, of advancing its own interest and profit as operator of merchant vessels competing with foreign vessels (and appellant, R. 26, 44, 13) in American foreign commerce (U. S. C., Title 46, Sec. 810). And notwithstanding the Board's duty under Section 15 of the Shipping Act, 1916 (U. S. C., Title 46, Sec. 814), is to check instead of further the conferences or combinations formed by certain shipowners for a selfish and monopolistic purpose, the Board has further committed itself to a partisan or factional interest by entering its own vessels in those conferences or shipping combinations (R. 44, 12). The record in this case shows that all those combinations are dominated and controlled by foreign companies (R. 28B, 28A), and that they are attempting to drive independent steamship companies out of business or to compel them to join the combination (R. 14), and thus establish a complete shipping monopoly in American foreign commerce (R. 14) so that rates can be stabilized or fixed by "conference" agreements between themselves on a monopoly basis at the expense of American shippers and the public. The Board has further identified itself with "factions interested in the event" (*Doty* v. *Love,* 295 U. S. 64, 71) so far as foreign commerce is concerned by adopting a fixed policy (R. 14) of furthering the "exclu-

sive contract" or rebate system which the shipping combinations dominated by the foreign companies are using as a means of coercing American shippers into shipping only on conference vessels (R. 14), and which was held by this Court to be illegal as an unreasonable restraint of trade and unfair competition in *Thomsen* v. *Cayser*, 243 U. S. 66, 87.

These facts are established by the uncontradicted evidence in the present record, and by the uncontradicted allegations in the complaint. And affidavits showing these facts have been introduced in evidence by counsel for the Secretary of Commerce to show the grounds on which the order here attacked was based (R. 37, 42, 45). And the affidavit of Mr. Isbrandtsen introduced in evidence by appellant (R. 24) is undenied that the Secretary of Commerce's assistant, Mr. Brown has admitted in writing that the Bureau's purpose "in investigating the rates and business of non-conference lines was to benefit the conference lines" (R. 24), and has further admitted to Mr. Isbrandtsen orally in the presence of witnesses that "the demand for the rate information sought by the Shipping Board Bureau from complainant's files, in reality came only from two of complainant's competitors, namely, the Black Diamond Line and the Dollar Line, both of whom are members of steamship conferences or combinations actively competing with complainant" (R. 24).

POINT II.

This order of inquisition directed specially against appellant by the Secretary of Commerce to compel disclosures of fact, constitutes an unreasonable search and seizure, because no legitimate ground for it has been specified.

The order of the Secretary of Commerce is "an official inquisition to compel disclosures of fact" (298 U. S. at p. 25), constituting an unreasonable search and seizure of appellant's records and book entries in violation of the Fourth Amendment to the Constitution. (Assignment of Error No. 10.) "The purpose disclosed is not a legitimate one" and therefore appellant "may not be compelled to answer" (298 U. S. at p. 26). The order is "a fishing expedition * * * for the chance that something discreditable may turn up" (237 U. S. at p. 26; 264 U. S. at p. 305). An inquisition "is not an end, but a means to an end", and "the end must be a legitimate one" (298 U. S. at pp. 25 and 26).

No purpose of the inquisition is disclosed in the order of the Secretary of Commerce (R. 49) excepting that the disclosures of fact are "necessary to the proper administration of the regulatory provisions of said act" (the Shipping Act, 1916) (R. 49).

What those regulatory provisions are is specified in the affidavits of H. S. Brown and S. D. Schell filed by counsel for the Secretary of Commerce at the hearing in the District Court (R. 37). Thirteen grounds are specified by Mr. Brown (see p. 5 of this Brief), and an additional one is specified by Mr. Schell (see p. 9 of this Brief).

Grounds Nos. 1, 2, 3, 7 and 10.

The first, second, third, seventh, and tenth grounds specified by Mr. Brown (see p. 5 of this Brief) are plainly "a fishing expedition * * * for the chance that something discreditable may turn up" in the nature of a violation by appellant of some one of the penal provisions of the Act so that a complaint or proceeding may be brought against it for the penalty by a shipper or by the Secretary of Commerce. Each of those grounds is a specific offense prohibited by a section of the Shipping Act (Ground No. 1, U. S. C., Title 46, Secs. 816 and 812; Ground No. 2, U. S. C., Title 46, Secs. 815, 816, and 812; Ground No. 3, U. S. C., Title 46, Sec. 816; Ground No. 7, U. S. C., Title 46, Secs. 815 and 812; and Ground No. 10, U. S. C., Title 46, Sec. 816); and no such offense has ever been charged against appellant by complaint by a shipper or by the Secretary of Commerce or by anyone else. Moreover, the Secretary of Commerce's duties in connection with those grounds (assuming he has the duties of the Shipping Board) are not of a "regulatory" or legislative or executive nature, but are restricted to acting as a judicial officer after complaint has been filed, excepting that he may also act as prosecuting officer in filing a complaint or charge (U. S. C., Title 46, Sec. 813) of an act of violation after "due notice to all parties in interest and hearing" (U. S. C., Title 46, Sec. 813); and after doing this he acquires subpoena power under Section 21 of the Act through himself as the judicial officer.

In *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, at page 305, this Court said:

"Anyone who respects the spirit as well as the

> letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, and as to correspondence, *even in the case of a common carrier,* in *United States* v. *Louisville & Nashville R. R. Co.,* 236 U. S. 318, 335." (Italics ours.)

The Commission which was investigating the common carrier in the case of *United States* v. *Louisville Co.,* 236 U. S. 318, was the Interstate Commerce Commission, which had express authority to "regulate" the carrier with respect to the matter inquired about, whereas in the case at bar the Secretary of Commerce has no authority whatever to regulate rates in foreign commerce, which is the subject-matter of the demand in the order here involved. This Court's decision restricting the Commission's power of investigation in the case of *United States* v. *Louisville Co.,* 236 U. S. 318, therefore goes much further than is necessary to dispose of the present case in favor of appellant.

And how much more dangerous does the improper use of the power to investigate become when that power is vested, not in an independent board, but in a department of the Executive, which department is itself engaged in the shipping business in direct competition with the appellant being investigated!

Grounds Nos. 11, 12, 13 and 14.

The eleventh ground specified by Mr. Brown (see p. 7 of this Brief) is that "greater stabilization of rates" (R. 41) is desirable in "foreign commerce" (R. 41), and that the agreements of the steamship companies joining the conferences or shipping combinations to coerce this "stabilization" and "other practices" (R. 40), are, although still prohibited by Congress in "the Sherman Anti-trust Act and the Clayton Act" (R. 40) unless "approved by the Government" (R. 41), a means to such "stabilization" according to the "experience of the Government" (R. 41). And the thirteenth ground specified by Mr. Brown (see p. 8 of this Brief) is that the "conferences" have been "one of the most potent methods of preventing rate wars" (R. 42). The twelfth ground specified by Mr. Brown (R. 41), and the fourteenth ground (which is specified by Mr. Schell (R. 44), that the Secretary of Commerce has entered his own vessels in the conferences "for the purpose of stabilizing rates and other practices" (R. 44), further specify in substance that the purpose of the order is to coerce the appellant, an independent steamship company, into joining the conferences or monopoly, or "stabilizing" its rates at the same high level as the rates fixed by the "conferences". That the eleventh, twelfth, thirteenth, and fourteenth grounds specified as the basis of this order are not

legitimate, has already been decided by this Court in *Thomsen* v. *Cayser,* 243 U. S. 66, at pages 85 to 87, as follows:

> "The defendants were common carriers and it was their duty to compete, not combine; and their duty takes from them palliation, subjects them in a special sense to the policy of the law. * * *
>
> The argument that is employed to sustain the contention is one that has been addressed to this court in all the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial and not a detrimental agency of commerce. * * *
>
> The resultant good of the plan, it is said, was 'regularity of service, with *steadiness of rates';* and that 'the whole purpose of the plan under which the defendants acted was to achieve this result.'
>
> We may answer the conjectures of the argument by the counter one that if defendants had not entered the trade others might have done so and been willing to serve shippers without constraining them, been willing to compete against others for the patronage of the trade. And it appears from the testimony that *certain lines so competed until they were taken into the defendants'* combination.
>
> Nor can it be said that under defendants as competitors or that under competing lines service would not be regular or rates certain, or, if uncertain, that they would be detrimentally so." (Italics ours.)

The steamship companies which were held guilty in that case of unlawful coercion and purpose were also,

like appellant's competitors and the Secretary of Commerce's steamship agency in the present case, joined together in a "'conference'—to use the word employed by the witnesses to describe the combining companies." (*Thomsen* v. *Cayser*, 243 U. S. at p. 86.)

Indeed the fourteenth ground specified for the order (by Mr. Schell; see p. 9 of this Brief), that the Secretary of Commerce is himself operating steamships in competition with foreign companies (also including appellant,—see R. 25-26), and that his vessels are members of the conferences or shipping monopoly dominated by the foreign flat companies (R. 44, 28B), shows so plainly that the order is an effort by one competitor (the Secretary of Commerce) or "factions interested in the event" (*Doty* v. *Love*, 295 U. S. 64, 71), to regulate another competitor (the appellant steamship company), that the order should peremptorily be held invalid without further search for a remotely possible but unreal legitimate purpose.

Ground No. 4.

The fourth ground specified by Mr. Brown for the order (see p. 6 of this Brief) is that the Secretary of Commerce is under a duty to investigate the relative cost and advantages in the foreign trade of operating American vessels as compared with foreign vessels. Certainly that is a specious ground in view of the fact that the order is directed against only one company (appellant), and the evidence fails to show that the Secretary of Commerce already knows—or has made any investigation to ascertain—the cost of operating other foreign or American vessels.

Ground No. 5.

The fifth ground specified by Mr. Brown for the order (see p. 6 of this Brief) is that the Secretary of Commerce "is under a duty to sell, as soon as possible, all of the merchant vessels owned by the United States, and, in order to accomplish this purpose, is specifically charged with keeping himself informed as to the sale price of vessels * * * and * * * existing freight rates and prospects of their maintenance" (R. 38). Surely that is no reason for singling out the appellant company and confining his study to it alone. That ground is clearly not the real ground underlying this order.

Ground No. 9.

The ninth ground specified by Mr. Brown for the order (see p. 7 of this Brief) is that the Secretary of Commerce has "given full publicity" (R. 39) to certain "Schedules" of rates to be charged by "members of conference agreements" (R. 39). Aside from the fact that those "Schedules" are merely of rates to be charged in the future, and not required by any law to be actually observed so far as foreign commerce is concerned, and do not cover anything like the scope of the demand in the present order, the ground given is specious because the Shipping Act expressly requires "members of conference agreements" to file their agreements as to schedules so that shippers and the public through the Shipping Board will be warned that a shipping combination has been created and is exercising monopoly powers for its own selfish interest. Such a monopoly has always been subjected to special regulation or prohibition by Congress because of its evil effects on shippers and the public by restraining

free competition among common carriers. The fact that an undisclosed non-conference carrier or carriers (R. 39) may, as a volunteer and without legal requirement, have filed such a "schedule" of future optional rates, and that the Secretary may have given them "publicity", is obviously no reason why appellant should be required to file, not such a schedule, but a copy or summary from its current records and books showing actual commodity movements in detail, with rates collected, and details of the places between which each commodity was carried, and the "date" the charge was made, etc. A "schedule" of rates to be charged would include rates on every known kind of commodity to every place in the world to which goods could be carried or to which they could be transshipped by connecting carriers. It would indicate nothing with respect to what particular commodities the carrier was actually booking and carrying, or the places between which those commodities were being carried, or the nature or extent of the carrier's actual current business transactions; and yet it is all this last-mentioned information which the present order demands from appellant. The affidavits filed by counsel for the Secretary of Commerce, and the theory and line of reasoning adopted in the District Court's opinion, overlook and ignore entirely the fact that Congress has never granted to the Shipping Board any power whatever of regulating or stabilizing or fixing freight rates in the foreign trade. (See Point I of this Brief.)

Grounds Nos. 6 and 8.

The sixth and eighth grounds specified by Mr. Brown for the order (see p. 6 of this Brief) are mere generalities that "schedules" are necessary "to

perform the many functions" (R. 38) of the Secretary of Commerce, and that the order was issued "for the purpose of carrying out the provisions of the aforesaid Acts" (R. 39). No specific ground is given or provision cited.

The foregoing analysis shows that none of the fourteen grounds for the order specified in the affidavits filed by counsel for the Secretary of Commerce is a legitimate ground. Accordingly the present case falls within the long series of decisions of this Court, culminating in *Jones* v. *Securities Exchange Commission,* 298 U. S. 1, that such an order of inquisition without specified legitimate ground constitutes a violation of the "unreasonable search and seizure" clause of the Fourth Amendment to the Constitution. The order not only requires appellant, without legitimate reason, to "produce his private books and papers for inspection by the commission" (*Jones* v. *Securities Exchange Commission,* 298 U. S. at p. 25), but also requires that the entries in its current records and books showing actual business transactions (eliminating merely names of persons), commodity movements between specified places, and the "dates" on which the price or rate for each commodity movement was charged or collected, be turned over to appellant's competitors, who are banded together in a shipping combination or monopoly. The Secretary of Commerce acts only as an intermediary in this wholesale inspection by appellant's competitors of appellant's records. And the Record shows by the Secretary's own admission (in the affidavit of S. D. Sch[illegible]ll his assistant,—R. 44), and by Mr. Isbrandtsen's uncontradicted affidavit (R. 26), that the Secretary is himself a "faction interested in the event" (295 U. S.

64, 71) because he operates steamships in direct competition with those of appellant (R. 26, 44, 29-36), and is also interested in furthering a shipping combination or monopoly (R. 44, 41, 26, 28A, 28B, and 28C) at the expense of independent steamship companies like that of appellant. And the evidence is uncontradicted that a majority in each of the conferences consists of foreign lines, and that they dominate and control every conference (R. 28B). The purpose of the order of the Secretary of Commerce is therefore established by this Record to be to further the selfish interests of the foreign steamship companies which constitute the majority in the conferences or shipping combinations, and which control them. The affidavits filed by counsel for the Government carefully refrain from denying this fact. The nearest they come to the point is in the affidavit of H. S. Brown in which he says merely that the American vessels in the conferences are "so numerous as *to compare favorably with those of any other particular nation*" (R. 41). (Italics ours.) That is not a denial of the plain allegation in the appellant's complaint (R. 12, article 23) that *the conferences consist of steamship companies "most of which are owned by aliens residing in foreign countries, and most of whose vessels are operated under the flags of foreign countries"* (R. 12), or of the plain allegation in the Exhibit incorporated as part of Mr. Isbrandtsen's affidavit that *"the conference lines, both in number and tonnage, are predominantly foreign"* (R. 28B). Neither do the affidavits filed by counsel for the Secretary of Commerce deny the direct allegation in the complaint (R. 12, article 22) and in Mr. Isbrandtsen's affidavit (R. 26) that "The defendants Roper, Secretary of Commerce, and James C. Peacock are actively and directly competing with com-

plainant in the same trades" (R. 26) by means of "steamships which are operated in competition with the steamships of complainant" (R. 12, article 22).

It is evident therefore from this Record that the Secretary of Commerce in issuing the order against appellant was in fact furthering the selfish interest of the foreign lines dominating the steamship conferences, and was doing so at the direct expense of American shippers and of independent steamship companies like appellant. Surely that is not a legitimate purpose, or a valid American national shipping policy.

POINT III.

The District Court erred in ignoring this Court's decisions in *Humphreys* v. *United States*, 295 U. S. 602, and *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, that Boards or Commissions like this are not executive agencies, and in holding that the definition of "executive agency" in the Economy Act (U. S. C., Title 5, Sec. 125) as a bureau or board "in the executive branch of the Government" is ambiguous or includes a Board which has clearly never been "in the executive branch of the Government".

The District Court does not mention, and plainly overlooked, the fact that after finishing with "executive agencies" Congress, in another part of the same Economy Act, proceeded to provide for the permanent continuance of the United States Shipping Board through three Commissioners appointed by the President for fixed terms of years and confirmed by the Senate and not subject to removal or "abolition" excepting for inefficiency or misconduct.

The District Court further erred in resolving a "doubt" whether the Shipping Board was an "executive agency" on the basis of a mistaken assumption

that Congress was in session for sixty days after June 10, 1933 (the fact of common knowledge being that Congress adjourned for the Session on June 16, 1933), and on the basis of an assumption that Congress' action in a minute paragraph of two appropriation acts in "providing funds to pay the salaries and expenses" (R. 56) of certain employees in the Department of Commerce who called themselves a "Shipping Board Bureau", and in casually mentioning as mere matter of recital or citation the Shipping Acts and the attacked Executive Order by "number" and "date", constituted a "ratification" of the invalid Executive Order so as to repeal the plain and detailed provisions in the Economy Act that the Shipping Board was to continue permanently as a body entirely outside the executive departments or executive control.

The District Court further overlooked the fact that in the Appropriation Act of June 16, 1933, by appropriating money for salaries of the three Shipping Board Commissioners provided for permanently in the Economy Act, for the fiscal year ending June 30, 1934, Congress plainly invalidated (assuming for purpose of argument it needed invalidating) the Executive Order of June 10, 1933, purporting to give undesignated employees in the Department of Commerce the powers and offices of the Shipping Board Commissioners.

The District Court further overlooked the fact that Section 21 of the Shipping Act, 1916, which is U. S. Code, Title 46, Section 820, is not mentioned in either of the Appropriation Acts which it states (R. 56) in its opinion are a "ratification", and yet that is the one under which the Secretary of Commerce attempted to justify his order here involved. The only sections mentioned in those Appropriation Acts are U. S. Code, Title 46, Sections 804, 805, 861-889, and 891-891X, all of which relate to mail contracts, construction loan funds and other special matters which might be ad-

ministered by a bureau in an executive department, but do not include a single section of the Shipping Act, 1916, dealing with regulation or with the quasi-legislative or quasi-judicial functions of the United States Shipping Board.

In *Humphrey's Executor* v. *United States,* 295 U. S. 602, at page 624, this Court, referring to a similar regulatory body (the Federal Trade Commission), said:

> "The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. 'It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.' *Illinois Central R. Co.* v. *Interstate Commerce Comm'n,* 206 U. S. 441, 454; *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238-239."

In *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, this Court said (at pp. 480 and 481):

> "The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. * * * In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect."

The District Court in the case at bar in mentioning in its opinion (R. 53-55) "Sec. 124" and "Sec. 125" of what it calls "The Executive Department Reorganization Act of June 30, 1932" (R. 53), fails to mention that the correct title of that Act is the Appropriations Act of June 30, 1932, Chapter 314 (commonly known as the Economy Act), and that the statute is quoted in full in 47 U. S. Statutes at Large 382, and that a simple examination of that Act (47 U. S. Statutes at Large 382, at pp. 408 and 413) demonstrates that the "Sec. 125" which the District Court mentions is really Section 402 under "Title IV.—Reorganization of Executive Departments" (47 U. S. Statutes at Large at p. 413) of the Economy Act, and that in another section—Section 306a (47 U. S. Statutes at Large 362 at p. 408)—in that very same Chapter 314 of that Economy Act Congress expressly provides under "Title III.—Miscellaneous Provisions * * * Reorganization of Shipping Board" (47 U. S. Statutes at Large, pp. 407 and 408) that the United States Shipping Board is to continue permanently as a board which should be entirely independent of the executive, as it had always been since its creation in 1916, but instead of seven commissioners should now, in furtherance of Congressional economy, consist of three commissioners to be nominated for a fixed term of years and confirmed by the Senate; and Congress itself in those sections 306a to 306h specifically provides what the reorganizing, economizing and consolidating, etc., shall consist of with respect to the Shipping Board and does not delegate or grant any authority whatever in that respect to the President, excepting merely the power to nominate commissioners and submit the nominations to the Senate. If the District Court had quoted in its opinion all the material parts of the Economy

Act (47 U. S. Statutes at Large 382, 408, 413), instead of only "Sec. 124" and mentioning "Sec. 125" (which is really section 402 at p. 413 of 47 U. S. Statutes at Large), the error into which it fell would be evident from its own opinion. The District Court plainly overlooked the fact that Congress itself in the Economy Act reorganized the Shipping Board and provided for its permanent continuance on an "economy" basis, and did not delegate to the President any power or duty whatever with respect to it. The President's powers were restricted to reorganizing executive agencies which were already within the Executive Dpartment, and did not include the United States Shipping Board, which is dealt with separately and is also separated by a completely different title and is contained in a wholly distinct and equally general subdivision of Chapter 314 of the Economy Act. Whatever the meaning of section 402 (referred to in the District Court's opinion as "Sec. 125", R. 55) may be when isolated from all the other sections in the Economy Act of June 30, 1932, and read by itself, its meaning is plain when read as it must be as part of the whole Economy Act in which it is contained.

The real question involved is not whether Congress ratified the Executive Order of June 10, 1933, but whether the meager citation or reference in the Appropriation Acts constitutes a repeal of the Economy Act of June 30, 1932, Chapter 314, sub-title United States Shipping Board, Section 306a, *et seq.*, which expressed a clear and unambiguous intention of Congress that the Shipping Board should be reorganized as therein provided and should continue permanently as a board of three commissioners holding offices for fixed terms of years and not removable by the Presi-

dent of the United States or under his control or the control of any other department in the Executive Department, excepting for malfeasance in office or misconduct. *Humphrey's Executor* v. *U. S.*, 295 U. S. 602.

No statute is to be construed as a repeal unless it is so clear as to admit of no ambiguity. The meager and almost meaningless and casual citations in the Appropriation Acts mentioned in the District Court's opinion cannot be said to be thus clear and unambiguous so that this Court could properly hold them to be a repeal under this well-settled rule that a repealing statute must be unambiguous and clear.

Moreover, a careful examination of the language of the Executive Order of June 10, 1933, and of the Appropriation Acts cited in the District Court's opinion indicates that if any intention is to be guessed at on the part of Congress and the President in the Executive Order and the Appropriation Acts it is that the intent was to transfer only the Fleet Corporation and such administrative duties of the United States Shipping Board as related to operation of government merchant vessels by the Fleet Corporation, construction loans, and mail contracts. It is only the sections of the Shipping Act and of the Merchant Marine Act dealing with the activities of the Fleet Corporation which are mentioned in the Appropriation Acts. The intention, therefore, if it is ascertainable or is to be forcibly inferred, seems to have been to transfer only such functions of the Shipping Board as were administrative and as were directly connected with the Fleet Corporation's activities as operator of government merchant vessels, and as lender of funds for ship construction and in connection with mail contracts.

POINT IV.

Congress had no power under the Constitution to authorize the President to transfer the functions of the United States Shipping Board to the Department of Commerce.

The functions of the United States Shipping Board were so broadly defined by Congress in the Shipping Act, 1916, and the Merchant Marine Act, 1920, and were of such a quasi-judicial and quasi-legislative character, that they obviously could not be performed properly or at all by an executive department or bureau, and it would have been a violation of the fundamental constitutional doctrine of separation of powers if Congress had intended those functions to be delegated to or exercised by an executive department or bureau. Assuming that a slight degree of legislative power may be delegated to an executive department, or rather become effective after a hearing and finding by an executive department, surely there is a limit and that is when, as in the present case, the legislative and judicial power attempted to be delegated is so great and substantial, and so inconsistent with its exercise by an executive department, that the executive department would become predominantly a legislative or judicial body rather than an executive body, so far as the exercise of those functions was concerned.

Humphrey's Executor v. *United States,* 295 U. S. 602, at pages 624, 625, 628 and 629.

Also the purported transfer of the regulatory functions of the Shipping Board to the Department of Commerce amounts to an unconstitutional delegation

of legislative power. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter* v. *U. S.,* 295 U. S. 495, 529. Congress in the Economy Act has in two respects abdicated the essential legislative functions vested in it. First, it has failed to define adequately the subject to which the Economy Act may be addressed. *Schechter* v. *United States,* 295 U. S. 495, 539, 541. And even if it be assumed that the subject is defined, Congress has failed to limit the range of the President's discretion over that subject. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter* v. *United States,* 295 U. S. 495.

The Economy Act states at the outset that:

> "The Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accomplished in great measure by proceeding immediately under the provisions of this title.
>
> Accordingly, the President shall investigate the present organization of *all executive and administrative agencies of the Government* and shall determine what changes therein are necessary to accomplish the following purposes:". (Italics ours.)

Hereinafter follow the six purposes which Congress has declared shall be accomplished.

Furthermore, the Act states in Section 403 (U. S. C., title 5, sec. 126) that:

> "Whenever the President, after investigation, shall find and declare that *any* regrouping, consolidation, transfer, or abolition of *any* executive

agency or agencies *and/or the functions thereof* is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by Executive order—

(a) Transfer *the whole or any part of any* executive agency *and/or the functions thereof* to the jurisdiction and control of *any other executive agency;*

(b) Consolidate the functions vested in *any* executive agency; or

(c) Abolish *the whole or any part of any executive agency and/or the functions thereof;* and

(d) Designate and fix the name and functions of *any* consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof." (Italics ours.)

It is apparent from the above quoted provisions of the Act that Congress has utterly failed to provide a subject matter within which the limited discretion of the President is to play. Just as the range of the code-making authority was unlimited in its scope in the *Schechter* case, so is the President's power to consolidate and co-ordinate any and all agencies in the present case. The President is authorized to "transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency". As the President has purported to abolish the Shipping Board, so may he abolish the Interstate Commerce Commission, the Federal Trade Commission, and any other independent board. To use the words of Mr. Justice

Cardozo in his concurring opinion in the *Schechter* case (at p. 551):

> "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion."

Second. Even if the Economy Act has defined the scope of executive action so as to satisfy the test laid down in the *Schechter* case, there has been a failure on the part of Congress to provide a standard or criterion to guide the President in the exercise of his duties within such defined scope. *Panama Co.* v. *Ryan*, 293 U. S. 388, at pages 415, 418, and 430. The purposes as set out in the Economy Act which are to be attained by executive order are as follows (sec. 401):

> "(a) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;
>
> (b) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;
>
> (c) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purposes;
>
> (d) To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government;
>
> (e) To eliminate overlapping and duplication of effort; and

(f) To segregate regulatory agencies and functions from those of an administrative and executive character."

It is apparent from the above quoted provisions that the recited purposes are so broad and the ability to accomplish them so much a matter of individual opinion that Congress has utterly failed to declare an adequate standard for the guidance of the President. The Act consequently falls on the authority of *Panama Co.* v. *Ryan,* 293 U. S. 388.

Finally, the Executive Order of June 10, 1933, is in violation of "historic practice" (*Panama Co.* v. *Ryan,* 293 U. S. at p. 431) in that it fails to set forth the findings upon which action was taken. The President's arbitrary statement, "I have investigated * * * and have determined" is a completely inadequate finding of fact upon which to base his order.

POINT V.

The order of the Secretary of Commerce deprives appellant of its property without due process of law in violation of the Fifth Amendment to the Constitution.

It has been shown under Points I and II of this brief that the true purpose of compelling appellant to file and make "public" the information demanded as to rate transactions and commodity movements is not to further the public interest but to advise appellant's competitors of its actual rate and business transactions thereby enabling appellant's competitors to destroy it. Appellant has expressed to the Secretary of Commerce its complete willingness to submit the information required on the condition that such

information be kept for the use of the Government of the United States and not be published to appellant's competitors. The Secretary of Commerce has refused to acquiesce in appellant's request.

The cases clearly establish that the regulatory authority of even an impartial, quasi-legislative, quasi-judicial body such as the Interstate Commerce Commission is not unlimited. An excess of power employed by that body is subject to judicial review, and an order in excess of power will be stricken down. In *Louisville Co.* v. *Interstate Commerce Commission,* 184 Fed. 118 (C. C. Ky., 1910), the decree of the District Court was approved by this Court in 227 U. S. 88 (1912). The Court had before it for consideration an alleged misuse of the rate-making authority of a quasi-legislative body such as the Shipping Board or the Interstate Commerce Commission. The District Court said (184 Fed. at p. 123):

> "There is no restriction upon the commission in respect to the matters which it will take into consideration or the weight it shall give to every of such matters in informing itself what opinion it ought to give, *except that it shall not abuse its authority and proceed arbitrarily without regard to the justice of the case or to give a judgment not fairly within its power.*" (Italics ours.)

In that case the Court had an order of the Interstate Commerce Commission before it. Here, the Court has to consider the order of a department in the executive branch of the Government, a department which is neither quasi-legislative nor quasi-judicial, and whose impartiality is endangered by the facts that it is itself the owner of ships operating in competition with appellant's vessels (R. 26, 44)

that it is a member of, and is assisting, a conference or shipping combination (R. 44) which is competing with appellant (R. 26, 44) and which is already using a rebate or "exclusive contract" system as a means of coercing appellant and American shippers (R. 14). The affidavits filed by counsel for the Secretary of Commerce himself show (R. 37, 42) that the furtherance of these partisan objectives is at least a principal ground on which the order of the Secretary of Commerce here attacked is based. This constitutes an arbitrary invasion of appellant's rights guaranteed it by the due process clause of the Fifth Amendment to the Constitution.

CONCLUSION.

The final decree of the District Court should be reversed with costs, and the cause should be remanded to the District Court with instructions to enter a final decree in favor of appellant, enjoining permanently the enforcement of the order of the Secretary of Commerce of November 18, 1935.

Respectfully submitted,

JAMES W. RYAN,
Counsel for Appellant.

APPENDIX.

Statutes Involved.

Section 21, Shipping Act, 1916 (U. S. C., Title 46, Sec. 820):

"The board may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever wilfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or wilfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment."

Section 18, Shipping Act, 1916 (U. S. C., Title 46, Sec. 817):

"Every common carrier by water *in interstate commerce* shall establish, observe, and enforce just and reasonable rates, fares, charges, classi-

fications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the *maximum* rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice." (Italics ours.)

Section 2, Intercoastal Shipping Act, 1933 (U. S. C., title 46, sec. 844):

"Every common carrier by water *in intercoastal commerce shall file with the United States Shipping Board and keep open to public inspection* schedules showing all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; and, if a through route has been established, all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route and points on the route of any other carrier by water. *The schedules filed and kept open to public inspection as aforesaid by any such carrier shall plainly show the places between which passengers and/or freight will be carried, and shall contain the classification of freight and of passenger accommodations in force, and shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered to the passenger, consignor, or consignee.* * * *" (Italics ours.)

Section 15, Shipping Act, 1916 (U. S. C., title 46, sec. 814):

"*Every common carrier* by water, or other person subject to this chapter, *shall file immediately with the board* a true copy, or, if oral, *a true and complete memorandum, of every agreement, with another such carrier* or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, *fixing or regulating trans-*

portation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, *regulating, preventing, or destroying competition;* * * * or in any manner providing for an *exclusive, preferential, or cooperative working arrangement.* The term 'agreement' in this section includes understandings, *conferences,* and other arrangements.

The board *may* by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly *discriminatory or unfair as between carriers,* shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. * * *

Every agreement, modification, or cancellation lawful under this section *shall be excepted from the provisions of sections 1 to 11, inclusive, and section 15 of chapter 1, of Title 15, Commerce and Trade, and amendments and Acts supplementary thereto* * * *" (the Sherman Anti-Trust Act and the Clayton Act). (Italics ours.)

Section 16, Shipping Act, 1916 (U. S. C., Title 46, Sec. 815):

"It shall be unlawful for any common carrier by water * * * To make or give any undue or unreasonable preference or advantage to any particular person, locality * * *."

Section 17, Shipping Act, 1916 (U. S. C., Title 46, Sec. 816):

"No common carrier by water in foreign commerce shall demand, charge, or collect any rate,

fare, or charge which is unjustly discriminatory between shippers or ports * * *."

Section 32, Shipping Act, 1916 (U. S. C., Title 46, Sec. 831):

"Whoever violates any provision of this chapter, except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by fine of not to exceed $5,000."

Section 14, Shipping Act, 1916 (U. S. C., Title 46, Sec. 812):

"No common carrier by water shall * * *

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. * * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper. * * *

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense."

Section 14a, Shipping Act, 1916 (U. S. C., Title 46, Sec. 813):

"The board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property——

(1) Has violated any provision of the preceding section, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers

or property between foreign ports, deferred rebates or any other unfair practice designated in the preceding section * * *."

Section 22, Shipping Act, 1916 (U. S. C., Title 46, Sec. 821):

"Any person may file with the board a sworn complaint setting forth any violation of this chapter by a common carrier by water * * *.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter."

Section 23, Shipping Act, 1916 (U. S. C., Title 46, Sec. 822):

"Orders of the board relating to any violation of this chapter shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion. * * *"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 307.

ISBRANDTSEN-MOLLER CO., INC.,

Appellant,

—against—

THE UNITED STATES OF AMERICA, DANIEL C. ROPER, individually and as Secretary of Commerce of the United States, *et al.*,

Respondents.

REPLY BRIEF FOR APPELLANT ISBRANDTSEN-MOLLER CO., INC.

JAMES W. RYAN,
Counsel for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 307.

ISBRANDTSEN-MOLLER CO., INC.,

Appellant,

—against—

THE UNITED STATES OF AMERICA, DANIEL C. ROPER, individually and as Secretary of Commerce of the United States, *et al.*,

Respondents.

REPLY BRIEF FOR APPELLANT ISBRANDTSEN-MOLLER CO., INC.

I.

We do not contend (as suggested at pp. 12, 48, 49, and 79 of the Government's Brief), that there should be "a fourth branch of government consisting of independent commissions or bureaus which exercise quasi-judicial and quasi-legislative powers". We contend to the contrary, and say that such a fourth branch is the logical result of counsel for the Government's own argument unless they are prepared to take the position that an executive officer can remain an executive officer after such extensive judicial and legislative duties of a non-partisan or bi-partisan nature have been thrust upon him that his principal or predominant function is that of a judicial or legislative officer.

The whole argument in the Government's brief on this point is based on the mistaken assumption that a board whose "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative" (*Humphrey's* v. *United States,* 295 U. S. 602, 624), is an executive agency "in the executive branch of the Government". Counsel for the Government ignore entirely the word "predominantly" which this Court used in stating the true principle in the *Humphrey's* case (295 U. S. 602, 624). They then cite, and rely on, decisions in cases in which it is obvious that the quasi-judicial or quasi-legislative action involved was a mere incident or subordinate matter in the general performance by an executive officer of duties which were predominantly of a strictly executive character.

The argument of counsel for the Government is the same as the argument of the President of the United States in his message yesterday to Congress, which is in substance that all non-partisan, judicial officers and agencies (excepting this Court and the District Courts and Circuit Courts of Appeal), and all bi-partisan legislative officers and agencies (excepting members of Congress), should be put under the control of, and made subordinate to, an executive or partisan officer or member of the President's Cabinet, simply because they have certain clerical or "housekeeping" work to do as an incident to the performance of their predominantly judicial or legislative functions, and this clerical work can be performed or "managed" by clerks in an executive bureau or department. On that principle there is no good reason for excepting this Court or Members of Congress from Executive control, their effective instrumentalities and subordinate but necessary means of performing their duties having been taken away, and we have a one-party government or dictatorship instead of a democratic or representative government. The

argument that the multitude of overlapping executive or partisan agencies and commissions, and Government "private corporations", should be put on a more efficient and economical basis, and more directly under Cabinet control, has merit, but that is not the argument made in this case in the Government's brief.

The failure in the Government's brief to give more than "summary" consideration (Government's Brief, pp. 50-51) to Title III of the Economy Act of June 30, 1932, in which Congress defined the non-partisan and geographically-representative and other necessary qualifications of the Shipping Board Commissioners exercising judicial and legislative functions, suggests that that part of the statute which was in effect on November 18, 1935 (when the order of the Secretary of Commerce, here involved, was issued) has not been given due consideration in contending that the Shipping Board is an executive or partisan agency. The language of the amendment of Title IV in 1933 affords no support for the contention that the President was being given authority to again "reorganize" the Shipping Board as a bureau under a purely executive officer after Congress had just finished reorganizing it on a permanent basis as a non-partisan judicial or legislative body not subject to executive control. Indeed the Shipping Board is not even mentioned in Title IV or in either of its amendments. (See Appendices A, B and C to this brief.)

It is conceded in the Government's brief that this Executive Order was issued under Title IV of the Economy Act (Government's Brief, pp. 2, 39, and 67). Indeed, the "section 16" mentioned in the quotation from the Executive Order at page 66 of the Government's brief as the basis of the order, is merely an amendment to Title IV of the Economy Act of June 30, 1932 (See Appendix B of this brief,—section 16 of

Title II of the amendment of March 3, 1933, to Title IV of the Economy Act of June 30, 1932). Therefore, the President was not purporting to interpret or construe Title III of the Economy Act. Nor is the language of Congress in Title III of the Act ambiguous. There is no room, therefore, for "administrative interpretation", and no presumption of regularity. Indeed, no such contention is made in the Government's brief. Consequently, there being no presumption of regularity, there can be no Congressional ratification by implication,—any ratification must be clear and unambiguous. Mere recitals or phrases, or descriptive references, will not do. Yet every bit of language taken out of its context in the so-called "ratifying" statutes by counsel for the Government in their brief is a mere recital or phrase or descriptive reference which is less than a complete indicative sentence or categorical statement.

Furthermore, Congress had no power under the Constitution (because of the separation of powers of Government into three independent branches) to grant to an executive officer the extensive and predominantly judicial and legislative functions of a non-partisan character which the United States Shipping Board possessed under the Shipping Act, 1916, and Merchant Marine Act, 1920. The Shipping Board Commissioners were either judicial officers or legislative officers, or both. They certainly were not executive officers, and their functions could not be constitutionally performed by an executive officer. Granting that it is impracticable to prohibit any exercise of judicial or legislative function by an executive officer, such exercise must be incidental, or at least must not be predominant; he must remain at all times predominantly an executive officer,—else the Constitution is violated because the three branches are not kept separate. It follows that even assuming

for purpose of argument that Congress had "ratified" the Executive Order (which it did not), Congress had no power under the Constitution to approve retrospectively, as of three years previously, an Executive Order which attempted to confer on an executive officer functions which were so predominantly judicial and legislative that his executive duties would immediately become subordinate and incidental and his judicial and legislative duties would become predominant. If this Executive Order is constitutional, and can be "ratified" by Congress, what, on the same principle, is the legal or practical objection to the President issuing a valid Executive Order putting this Court or Congress under control of an executive officer! If the Constitutional doctrine of separation of powers is insufficient ground for invalidating as beyond possibility of legislative ratification an Executive Order attempting to make an executive officer a predominantly judicial and legislative officer, why is it necessary for the President to obtain any authority at all from Congress? If Congress is not bound by that Constitutional doctrine, then the President is not bound, and no "ratification" by Congress is needed.

There might be good reason to require that every office, commission, or bureau in the Government be put definitely in a designated one of the three branches of government, so that, if judicial, its decisions may be reviewable by a proper appellate court or this Court, and if legislative it would work under the direct supervision of Congress (like the Federal Radio Commission; see *Radio Comm'n.* v. *Nelson Bros. Co.,* 289 U. S. 266, 276), and, if executive, it would be under the direct control of the President or the head of one of the Executive Departments. But if that principle were applied in the present case the non-partisian Shipping Board, and the Secretary of Commerce if he is its suc-

cessor (and the similarly non-partisan and judicial or legislative commissions composed of experts in their field, such as the Interstate Commerce Commission and the Federal Trade Commission), would be in the judicial branch or the legislative branch, and the President would have no control over them.

Indeed that principle has already been substantially applied to the Shipping Board, because a right of appeal now lies from its judicial decisions to a three-Judge statutory District Court (the same as from decisions of the Interstate Commerce Commission), and after that there is a right of direct appeal to this Court. Section 31, Shipping Act, 1916. Also it is required to report and make recommendations annually to Congress on a few matters not material here. Section 12, Shipping Act, 1916. And until the Secretary of Commerce attempted to take charge, the personnel of the managing officers of the "private corporation" operating Government merchant vessels was kept entirely distinct and independent from the Commissioners and employees of the Shipping Board. Indeed the corporation was formed for the very purpose of avoiding the obvious incompatibility between its functions (as stated in its charter) and those of the Shipping Board.

The fact that after the Executive Order was issued the Secretary of Commerce issued a memorandum on August 9, 1933, continuing "the present members of the Shipping Board" (R. 47) as "included" in an "advisory committee" to which he might if he desired "refer any questions" (R. 47), is insufficient to show that they functioned in such an anomalous position, or were accorded a degree of independence within the Department, instead of being reduced to bureau status or less. Indeed, the Official Register of the United States, 1934, does not list them at all as being in the Department of Commerce.

Title III of the Economy Act of June 30, 1932 (47 U. S. Stats. at Large 408) reorganizing the United States Shipping Board on a permanent basis, remained on the statute books in full force, and not amended or repealed in any respect whatever, until June 29, 1936, when the Merchant Marine Act, 1936 (c. 858, 49 Stat. 1986) was enacted, repealing Title III of the Economy Act of June 30, 1932, by providing for the nomination by the President, with the advice and consent of the Senate, of five Commissioners to constitute a new, non-partisan, nationally-representative, and predominantly judicial and legislative body to be known as the United States Maritime Commission, and to take over "All the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916, the Merchant Marine Act, 1920, * * *."

No statute was enacted between June 30, 1932, and June 29, 1936, which could possibly be regarded as a repeal of the detailed provisions in Title III of the Economy Act of June 30, 1932, with respect to the newly-reorganized Shipping Board. Indeed there is no contention in the Government's brief that Congress enacted any statute during that period which repealed or amended Title III of the Economy Act of June 30, 1932. The contention in the Government's brief in substance (although it is stated in the anomalous form of "ratification") is that an Executive Order issued by the President on June 10, 1933, under Title IV of the Economy Act of June 30, 1932 (47 Stats. 414), as amended, 47 Stats. 1517; 48 Stats. 16 (with reference to executive agencies "in the executive branch of the Government"), constituted a repeal of Title III of the Economy Act of June 30, 1932, 47 Stats. 408 (which expressly named the United States Shipping Board and provided in detail for its permanent continuance as a non-partisan judicial and legislative body consisting of

three Commissioners nominated by the President of the United States and to be confirmed by the Senate). This contention in substance in the Government's brief that the President can by mere Executive Order repeal an Act of Congress is novel and, if pressed to its logical consequences, leads to startling and far-reaching results. It makes the Executive a dictator, supreme over Congress. The independence of the legislative branch of the Government is terminated, and the Constitutional principle of separation of powers of Government into three branches is violated.

The exigency of their case forces Government counsel to rely on this contention. On November 18, 1935, when the order of the Secretary of Commerce here involved was issued, Title III of the Economy Act of June 30, 1932 (47 Stat. 408), was on the statute books, unamended and unrepealed. It was the law of the land. According to its express provisions there was a non-partisan United States Shipping Board in existence, consisting of three Commissioners, and nothing short of death itself (or removal for misfeasance) could terminate their functioning unless their fixed terms should expire and their successors should be appointed and qualify. No order issued by the Secretary of Commerce on that date could possibly be an order of the United States Shipping Board unless the President of the United States had the power to override Title III of the Economy Act by issuing an Executive Order under Title IV of that Act.

To meet this difficulty the contention is made in effect in the Government's brief that a mere recital or mention of that Executive Order in certain Appropriation Acts in making appropriations during that period for a bureau in the Department of Commerce constituted a repeal by Congress of the detailed provisions in Title III of the Economy Act of June 30, 1932, with

reference to the Shipping Board. But none of those Appropriation Acts even mentions Title III of the Economy Act of June 30, 1932. And aside from the fact that such recitals in the Appropriation Acts are not sufficiently clear and unambiguous to constitute a repeal of Title III, the contention is without merit because as pointed out in our main brief, the only sections of the Shipping Act, 1916, and Merchant Marine Act, 1920, mentioned in those recitals, deal with purely administratrive functions as distinguished from the regulatory, or quasi-judicial and quasi-legislative functions here involved.

Finally the contention is made in effect in the Government's brief that the Merchant Marine Act, 1936 (c. 858, 49 Stat. 1986), not merely repealed Title III of the Economy Act of June 30, 1932, but also "ratified" the Executive Order which had been issued on June 10, 1933, under Title IV of that Act on the mistaken assumption that the Shipping Board was an executive agency "in the executive branch of the Government". It is difficult to conceive how a statute could have this hybrid character, or effect such a change in the constitutional separation of powers. But aside from that, it is evident from the language in the Merchant Marine Act, 1936, that Congress mentioned the bureau in the Department of Commerce only by way of recital, and was merely terminating any authority, presumably administrative, that it might have. Congress' principal intention in the Merchant Marine Act, 1936, was to create a nonpartisan judicial and legislative commission as a successor to the United States Shipping Board originally created in the Shipping Act, 1916. It wasn't trying to "ratify" anything, and the word "ratify", or any synonym of it, does not appear anywhere in the Act.

Indeed the question of "ratification" by Congress of an Executive Order, argued in the Government's brief,

is not presented on the facts of this case. The statute—Title III of the Economy Act of June 30, 1932,—remained at all times unamended and unrepealed on the statute books until June 29, 1936, when the Merchant Marine Act, 1936, was enacted. No Executive Order was authorized to be issued under Title III, and none was so issued; and any Executive Order issued under Title IV relating to executive agencies "in the executive branch of the Government" must necessarily have had for its object the reorganization of executive agencies which had not already been reorganized directly by Congress itself in Title III of that Act. The Shipping Board was so reorganized by Congress in Title III, and no authority was granted the President in Title IV to do that job over again on some different basis so that Congress' work of reorganization of the Shipping Board, just finished, would be upset and so that the Board would become a purely executive agency rather than a nonpartisan and predominantly judicial and legislative body.

Just before the Merchant Marine Act, 1936, was enacted, the situation confronting Congress was that a statute—Title III of the Economy Act of June 30, 1932—was in full force and effect, providing for the permanent continuance of the non partisan Shipping Board of three Commissioners on the basis of a reorganization effected directly by Congress in that statute. The President of the United States had completed that Congressional reorganization in the year 1933 when he nominated three Commissioners and the Senate confirmed them. There was nothing the President of the United States could validly do after that in the way of abolishing the Shipping Board or removing any of its Commissioners excepting for misfeasance. Consequently the only question then before Congress was whether it should do nothing or should repeal Title III of the Economy Act by enacting a statute

creating a new Shipping Board of the same non-partisan and predominantly judicial and legislative type but with a larger number (five) of Commissioners also selected on a national or geographically-representative basis, and with more detailed or different powers. No question of ratification of unauthorized activities of the President was presented for decision; and there is nothing whatever in the legislative debates in the Congressional Record or in the Congressional Committee hearings to support the contention that the President had applied to Congress to have it ratify an unauthorized action by him, or an invalid Executive Order issued by him. Nor is there anything in those Debates or Hearings to indicate that any Congressman had the slightest idea that Congress was ratifying an unauthorized action or invalid Executive Order of the President. The debates and hearings show that Congress was then merely repealing Title III of the Economy Act of June 30, 1932, by creating, as a substitute, a larger non-partisan board or commission of the same type and with the same predominantly judicial and legislative functions.

No more complete change could be imagined than for the appellant steamship company to be told one day that it was being regulated by a non-partisan and nationally representative body of Commissioners exercising predominantly judicial and legislative functions, and to be told the next day that because of an Executive Order it was now being regulated by a purely executive officer who happened to be appellant's chief competitor in the steamship business.

Where is that Executive Order? It is not in the Record, nor is a copy of it appended to the Government's brief in this case. There is a partial quotation from it in a note at the bottom of page 66 of the

Government's brief, but the part quoted is not contained in any printed publication or other paper that appellant has been able to find. It is not printed in the "Federal Register", which began publication late in the year 1934 after this Court's decision in the case of *Panama Refining Co.* v. *Ryan,* 293 U. S. 388. At the oral argument of that case this Court said that an Executive Order could hardly be binding on the public if it was not published in an official publication available to the public. The Executive Order involved in that case was issued on July 11, 1933 (293 U. S., at p. 405). The Executive Order on which respondents rely in the present case was issued a month earlier, on June 10, 1933. The Executive Order involved in the present case is mentioned at pages 2, 38, 54 and 85 of the Government's brief, but in no instance is reference made to any publication or report in which a copy of it may be found. Appellant's counsel has found what is evidently a part of that Executive Order printed as a kind of note at the end of Section 132 of Title 5, United States Code. That note, however, contains none of the quotation from the Executive Order made on page 66 of the Government's brief in this case.

In *Carter* v. *Carter,* 298 U. S. 238, at page 311, this Court said:

> "The difference between *producing coal* and *regulating its production is, of course, fundamental.* The former is a private activity; *the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor.* And a statute which attempts to confer such power undertakes an intolerable and *unconstitutional interference with personal liberty and private property.* The delegation

is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp.* v. *United States,* 295 U. S. at p. 537; *Eubank* v. *Richmond,* 226 U. S. 137, 143; *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, 121-122." (Italics ours).

In the Economy Act of June 30, 1932, Public No. 212, Seventy-second Congress (47 U. S. Statutes at Large 382), Congress itself in Title III. reorganized the Shipping Board on a permanent basis as a non-partisan and nationally-representative body, independent of the Executive, with predominantly judicial and legislative functions, and reduced the number of Commissioners from seven to three, and made several other changes in the interest of economy and efficiency, and in Title IV. of the same Economy Act authorized the President to reorganize the executive agencies "in the executive branch of the government".

On July 30, 1932, while Congress was in recess, the President of the United States reorganized the Shipping Board in accordance with Title III. of the Economy Act of June 30, 1932, by appointing the three Commissioners to constitute the new Board,—T. V. O'Connor, Atlantic coast representative, Chairman, for a term of three years from June 30, 1932; Samuel S. Sandberg, Pacific coast representative, for a term of two years from June 30, 1932; and Hutch I. Cone, Gulf coast representative, for a term of one year from June 30, 1932. (See Appendix E to this brief.)

On January 3, 1933, the nominations of the three Commissioners above-named were submitted by the President to the Senate. As no action was taken by the Senate on their nominations the recess appointments

automatically terminated with the adjournment of the Seventy-second Congress on March 4, 1933.

On March 3, 1933, Congress enacted an amendment (47 U. S. Statutes at Large 1517) to Title IV. (relating to executive agencies) of the Economy Act of June 30, 1932, making minor changes in that Title, principally with respect to the President's required investigations and findings, but making no change whatever in Title III. (47 U. S. Statutes at Large 408) of that Economy Act relating to the reorganization of the Shipping Board.

On March 4, 1933, a new President of the United States assumed office.

On March 15, 1933, the President of the United States, in accordance with Title III. (relating to reorganization of the Shipping Board) of the Economy Act of June 30, 1932, forwarded to the Senate the nominations of three Commissioners to constitute the newly-reorganized Shipping Board,—Hutch I. Cone of Florida, representing the Gulf coast, for a term of three years from June 30, 1932; David W. Todd of New York, representing the Atlantic coast, for a term of one year from June 30, 1932; and Gatewood S. Lincoln of California, representing the Pacific coast, for a term of two years from June 30, 1932. (See Appendix E to this brief.)

On March 20, 1933, the Senate confirmed the nominations.

Although Commissioner Todd's term of office expired at midnight June 29, 1933, he continued to function under the provision of Title III. of the Economy Act of June 30, 1932, that notwithstanding a Commissioner's period of office for a fixed term of years should expire, he should continue in office indefinitely until the appointment and qualification of his successor. (No successor has been appointed or has qualified to any of the three Commissioners,—Todd, Cone, or Lincoln.)

On June 10, 1933, with the Shipping Board thus reorganized on a permanent basis under Title III of the Economy Act by both Congress and the President, the President by Executive Order undertook anew a different kind of reorganization, this time on the assumption that the Shipping Board was an executive agency "in the executive branch of the government" under Title IV. of the Economy Act, thus ignoring the detailed provisions in Title III. of the Economy Act with respect to the reorganization of the Shipping Board after describing it by name. The whole Shipping Board was, by this Executive Order, eliminated as a non-partisan body, and as a predominantly judicial and legislative body, and it was put directly under the personal control of a member of the President's Cabinet. The Executive Order purported by indirection to dismiss all the Commissioners of the Shipping Board from office; and in providing the "Department of Commerce" as a substitute to perform their functions, no provision was made that the substitutes be selected on a nationally or geographically-representative basis; nor was any provision made that "Not more than two of the Commissioners shall be appointed from the same political party" (Economy Act, 47 U. S. Statutes at Large 382). The regulation of the whole shipping business of the country was thus put under the exclusive control of one political party. The Executive Order purported to abolish the Shipping Board entirely and to transfer, effective August 10, 1933, all its functions to the "Department of Commerce" under authority of Title IV. (relating to executive agencies in the executive branch of the government) of the Economy Act. The Executive Order was sent to Congress with numerous other documents on June 10, 1933.

On June 15, 1933, Senator White of Maine learned

of the Executive Order and stated (Cong. Rec., Vol. 77, p. 6154):

> "The Shipping Board and the Emergency Fleet Corporation have a multitude of duties and responsibilities. There are many operative functions of both which I think might well be transferred to the Department of Commerce, but the Shipping Board is a regulatory body, having quasi-judicial functions. It has a wide range of authority over water rates in both interstate and foreign commerce. It has jurisdiction, and it acts, when it exercises that jurisdiction, in a judicial capacity, over rates, rebates, discriminations, preferences and practices of water carriers and all manner of questions of that sort. *It is utterly inconceivable to me that those authorities can properly be transferred to and be exercised by an official of the Department of Commerce.*" (Italics ours.)

Congress was then in a legislative "jam" on other matters, and adjourned *sine die* on the next day, June 16, 1933. Senator White, when in the House, had been for many years Chairman of the House Committee on Merchant Marine and Fisheries, and had presided over the hearings in connection with the drafting and enactment of the several shipping Acts. Later, on being elected to the Senate, he became a leading member of the Senate Committee on Commerce, which has charge of shipping legislation. His dramatic outcry on the floor of the Senate in an effort to halt what he believed to be an obviously invalid Executive Order was ignored by the President of the United States and by the Secretary of Commerce.

On April 30, 1935, one of the respondents in the present case, James C. Peacock, admitted to the House

Committee on Merchant Marine and Fisheries as follows:

> "Mr. Peacock: I may say personally I feel that the regulatory functions are out of place in an executive department" (p. 403, Hearings before House Committee on Merchant Marine and Fisheries, 74th Congress, 1st session on H. R. 7521, to develop an American Merchant Marine).

Although counsel for the Secretary of Commerce quote in their brief from discussion or debate in Congress, they do not, we respectfully submit, quote an adequate summary of those debates. They quote isolated remarks of Mr. Ludlow and Mr. Mapes, Members of Congress. Counsel for the Secretary of Commerce ignore entirely in their brief the deliberate and earnest attack on the validity of the Executive Order by the Senator who was Chairman for many years of the Congressional Committee directly in charge of shipping legislation. We annex as Appendix "D" to this brief quotations from the legislative debates in the Congressional Record.

On that last day of the session, June 16, 1933, Congress appropriated money for the salaries of the three Commissioners of the Shipping Board until the end of the fiscal year, namely, June 30, 1934.

Congress thereupon being in adjournment, the American Steamship Owners' Association, representing substantially every steamship company in the United States, filed through its legal counsel, Messrs. Kirlin, Campbell, Hickox, Keating & McGrann of New York City, a formal protest against the Executive Order, in the form of a legal opinion by that firm that it was wholly invalid. This protest was referred to the Attorney General of the United States, who shortly afterwards filed a very short opinion that the Executive Order was valid. That opinion is published in volume

37, Opinions of the Attorney General of the United States, at page 238.

On August 9, 1933, the Secretary of Commerce issued an "order" or memorandum that "the present members of the Shipping Board" are to be an "advisory Committee" to the Secretary of Commerce on matters he "may" refer to them from time to time, and whose advice he may follow or not as he chooses. (R. 47.)

On December 1, 1933, the three Commissioners of the United States Shipping Board,—Hutch I. Cone, Chairman, David W. Todd, Vice Chairman, and Gatewood S. Lincoln, Commissioner,—transmitted to Congress "the seventeenth annual report of the United States Shipping Board and the United States Shipping Board Merchant Fleet Corporation covering the fiscal year ended June 30, 1933" (U. S. Shipping Board Report to Congress, dated December 1, 1933, p. v; Appendix E to this brief).

The "Official Register of the United States, 1934", at page 109 (Government Printing Office, Washington, 1935), shows that a United States Shipping Board "bureau", apparently set up by the Secretary of Commerce, consisted of:

(a) three employees of the Merchant Fleet Corporation (H. S. Brown, "Acting Chief, Division of Regulation"; S. D. Schell, "Assistant to the Director"; and F. G. Frieser, "Chief, Division of Traffic");

(b) a "Director", J. C. Peacock (who, the evidence in the present Record shows, was the President of the Merchant Fleet Corporation, R. 36, 26, 12-13);

(c) a "Chief, Division of Shipping Research" (A. H. Haag); and

(d) a "Chief, Division of Loans and Sales" (J. W. Barnett).*

None of these men was an "officer of the United States", that is, a person nominated by the President and confirmed by the Senate; nor did any of them hold a "commission" from the President of the United States; nor did any of them hold any statutory position. Even the "bureau" itself was set up without statutory authority. There is nothing to indicate that any of those six men was employed in any capacity in the "Department of Commerce" at the time the Executive Order became effective.

Three (Peacock, Shell and Haag) of the six men were "from the same State" (Maryland) (p. 109, Official Register of the United States, 1934), in spite of

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* At page 109 of the "Official Register of the United States, 1934" (published by the Government Printing Office, Washington, 1935), it is stated:

"DEPARTMENT OF COMMERCE

Name	Official Title and Station	*Legal residence* State	Cong. dist.		Compensation
United States Shipping Board Bureau					
J. C. Peacock	Director	Md.	6th		8,000
S. Duvall Schell	Assistant to Director	Md.	6th		(16)
F. G. Frieser	Chief, Division of Traffic	N. J.	9th	(17)	6,500
A. H. Haag	Chief, Division of Shipping Research	Md.	4th		8,000
J. W. Barnett	Chief, Division of Loans and Sales	Ohio	8th		10,000
H. S. Brown	Acting Chief, Division of Regulation	Mass.	2d	(17)	6,500

16 Salary as Secretary, Merchant Fleet Corporation.
17 Paid from Merchant Fleet Corporation funds."

the express requirement by Congress in Title III of the Economy Act that "not more than one (Commissioner of the United States Shipping Board) shall be appointed from the same State". And none of the six men complied with the requirement by Congress in Title III of the Economy Act that "One of such commissioners shall be appointed from the States touching the Pacific Ocean", or with the requirement that there be "one (Commissioner) from the States touching the Gulf of Mexico."

The Merchant Fleet Corporation is a private corporation organized under the general corporation laws of the District of Columbia. The two employees of that corporation (H. S. Brown and S. D. Schell) whose affidavits were introduced by counsel for the Secretary of Commerce at the hearing in the District Court in the present case, as the principal defense or evidence of the respondent Secretary of Commerce (R. 37, 42), were thus not employees of the Department of Commerce but were employees of a private corporation. It appears from those affidavits that those two employees of the Merchant Fleet Corporation were in every substantial sense the persons actually formulating and issuing the order of the Secretary of Commerce sought to be enjoined. And the uncontradicted allegations in the complaint (R. 12-13) and evidence in the Record (R. 36, 26) establish that James C. Peacock, the "Director" of the Shipping Board "bureau", was in fact the active President of the Merchant Fleet Corporation.

It is inconceivable that Congress by the Economy Act intended to authorize the President to wipe out of existence the entire United States Shipping Board and all its Commissioners, who were "officers of the United States", and to "transfer" all its non-partisan and quasi-judicial and quasi-legislative functions to the employees or officers of a private steamship corpora-

tion. Congress clearly expressed its intent in the Economy Act that the persons who should be its legislative agents and/or judicial officers in performing the quasi-legislative and quasi-judicial functions of the United States Shipping Board should be officers of the United States nominated by the president and confirmed by the Senate and holding office for fixed terms of years without power by the executive branch of the Government to control the performance by them of their functions or to remove them from office. The Executive Order transferring the duties of those officers to undesignated employees in the Department of Commerce violates that intent.

As we have shown, no fourth branch of the government is necessary. That statement or assumption, repeatedly made in the Government's brief (Government's Brief, pp. 12, 48, 49 and 79), and to which a large part of its brief is devoted, is answered at page 48 of our main brief. The law, without losing any substantial part of its certainty or of its effectiveness in definition and application, has always necessarily dealt with questions of degree, and with terms defined with less than mathematical exactitude, for instance, the term "unreasonable restraint of trade" (*Standard Oil Co.* v. *United States*, 221 U. S. 1).

The initial and primary question here is whether the body of Commissioners constituting the Shipping Board was predominantly in the judicial branch or in the legislative branch (or in both), rather than in the executive branch. If it was, then it was not an executive agency or independent establishment "in the executive branch of the Government", which is the definite limitation imposed by Congress in the Economy Act on the President's field of activity in effecting transfer, abolition, or other reorganization.

Congress clearly expressed its intention in the Economy Act that even within the executive branch of the Government regulatory agencies should be separated or segregated by the President from administrative agencies. Section 401 of the Economy Act, stating its purposes, provides:

> "(f) To segregate regulatory agencies and functions from those of an administrative and executive character."

A fortiori, a regulatory body which was exercising predominantly quasi-judicial and quasi-legislative functions and which was not within the executive branch of the Government should not have been combined or consolidated by the President with an administrative or strictly executive and political agent such as the Department of Commerce or the Secretary of Commerce. To do so was to violate the legislative standard set up by Congress within which the President was necessarily restricted while acting as legislative agent in effecting reorganization,—or, more strictly speaking, while he was investigating and finding the specific facts which would bring into application the legislative standard or rule already set up by Congress.

Congress granted no discretion to the President to ignore its direction that regulatory agencies be separated from "those of an administrative and executive character". And he could not validly resort to any of the other purposes of the Economy Act for the purpose of avoiding the clearly expressed Congressional intent or legislative standard that regulatory agencies should be separated from those of an administrative and executive character. An examination of the Executive Order fails to disclose which of the legislative standards set up by Congress in the Economy Act the President was purporting to bring into application by

his investigation and finding. The investigation, finding and standard are so vaguely referred to in the Executive Order that it is mere speculation what standard was being applied. Presumably, however, since a regulatory agency was being transferred to, or consolidated with, an administrative and executive agency, the standard being applied was the one providing that regulatory agencies should be segregated from those of an administrative and executive character. That being so, the Executive Order of June 10, 1933 was invalid for that reason alone.

Counsel for the Secretary of Commerce make no effort in their brief to meet the real issue pointed out in our main brief (Appellant's Brief, pp. 46 and 47), which is whether or not the recitals they and the District Court mention in the Appropriation Acts are so clear and unambiguous that they can be considered a repeal by Congress of the unambiguous and detailed provisions in Title III of the Economy Act with reference to the permanent reorganization and continuance of the Shipping Board as a non-partisan body of experts or local representatives independent of the Executive. They devote much of their brief to a so-called "ratification" by Congress of the Executive Order of June 10, 1933, issued under the Economy Act. They contend in substance that that ratification makes the Executive Order a statute or law of the United States which is a substitute for the numerous express provisions by Congress under another title in that Economy Act constituting a reorganization directly by Congress of the United States Shipping Board on a reduced and more efficient basis so far as the number of commissioners and other economies and simplifications are concerned, and providing for the permanent continuance of that board independently of the executive branch of the Government as a quasi-judicial and quasi-legislative

body of three commissioners nominated by the President and confirmed by the Senate and holding office for fixed terms of years and whose terms are never to expire "until their successors are appointed and qualify" (Title III of Economy Act—Act of Congress of June 30, 1932, 47 U. S. Statutes at Large 382). This last provision which was not in the original Shipping Act, 1916, or in the Merchant Marine Act, 1920, shows a definite, clear and specific intent of Congress that the board was never to cease to exist as a quasi-judicial and quasi-legislative body independent of the executive branch of the Government. Congress by that provision clearly intended to prevent the President from attempting to assume control over the Shipping Board, or to interfere with its proper functioning as a body independent of the Executive by failing to nominate commissioners when vacancies should occur. The historical fact is that certain earlier Presidents of the United States had attempted to assume control over the Shipping Board by failing to appoint commissioners when vacancies had occurred. The control by the President would automatically follow when the vacancies not filled were those which the President was required by Congress to fill by nomination of the opposing political party or by nomination of a person from a designated geographical section of the country that the President did not wish represented on the board, notwithstanding Congress' intention. By mere failure to nominate commissioners to fill vacancies, the President could (before Title III of the Economy Act of June 30, 1932, was enacted) thus terminate the truly national and geographical representative character of the Shipping Board as elaborately provided for by Congress and could also change its character from that of a predominantly judicial and legislative body independent of the Executive to a predominantly political body rep-

resenting only the political faith and doctrine of the political party in power and subject in effect to direct domination by the President. Indeed the President of the United States did thus exercise control by permitting the Shipping Board to function for a substantial period of time as a board of one commissioner (although Congress had expressly provided for a nationally-representative board of seven commissioners), and permitted it to function for another still more substantial period as a board of only two commissioners. This was the evil which Congress was trying to remedy in the Title (Title III) in the Economy Act, in which it itself reorganized the Shipping Board on an economy basis and provided for its permanent continuance without power of the Executive or President ever to assume control over it. The Executive Order of June 10, 1933, cannot be regarded as a repeal of those statutory provisions by Congress itself, nor can it in any sense be regarded as tending to remedy that evil; instead the Executive Order tends to accentuate it.

The fact is the President did nominate and the Senate did confirm the three new commissioners of the United States Shipping Board provided for in Title III of the Economy Act, and under the express terms of that Act they continue in office until their successors have been nominated and confirmed and have qualified and begun to act.

The anomalous results of the Executive Order of June 10, 1933 in practical application are shown by the affidavit of R. H. Hallett, which was introduced in evidence by counsel for the Secretary of Commerce at the hearing of the present case in the District Court, and which shows that even after the President had "transferred" the Shipping Board to the Department of Commerce, "the present members of the Shipping Board" (R. 47) were thereafter to continue as such,

but were merely to function as an "advisory committee" to the Secretary of Commerce, which the latter could ignore or not as he chose (R. 47), and whose advice need not even be considered by him (R. 47).

II.

At pages 15 and 16 of the Government's brief, the "purposes" of Section 21 of the Shipping Act, 1916, (under which the Secretary of Commerce's order purports to have been issued), are stated as being to enforce Sections 14, 15, 16, and 17 of the Shipping Act, 1916 (U. S. Code, title 46, sections 812, 813, 814, 815, and 816). It was pointed out in our main brief (Appellant's brief, page 33) that each of those sections prohibits, under specified penalty, the commission of a defined offense; that the Shipping Board functions as a judicial body in respect to a violation of those sections; and that by the very terms of the Shipping Act, 1916, they can be enforced only by filing a complaint or proceeding against appellant charging a specific violation. There is no answer in the Government's brief to this point.

The Record affords no support for the contention that other steamship companies are filing with the Secretary of Commerce the rate and current business transaction records demanded of appellant by this order of November 18, 1935. The allegations of the complaint, and the appellant's evidence, are uncontradicted that what the other steamship companies file is merely a schedule of rates to be charged in the future, which they are not required by law or any regulation to adhere to, and which has been fixed by agreement of a majority in a conference or shipping combination, and which can be wholly abandoned five minutes after the schedule has been filed by the representatives of the majority in the

conference agreeing on a new schedule or rate which they do not have to file with the Shipping Board (or the Secretary of Commerce) until the expiration of thirty days after they have put it into effect. There is no law whatever requiring that conference agreements as to schedules of rates or any other matters be lived up to or performed. The only reason those schedules of rates are filed by the other companies is because Congress has provided in section 15 of the Shipping Act, 1916, that they must do so to avoid being prosecuted as an illegal combination in restraint of trade in violation of the Anti-Trust Act.

Appellant is the only steamship company operating in American foreign commerce which is being required by the Secretary of Commerce to file its actual rate and current business transaction records; and in addition the uncontradicted allegation in the complaint is that the Secretary of Commerce has notified appellant in writing that if appellant does file those current records, the Secretary of Commerce will immediately divulge them to appellant's competitors in the shipping combination and to the public generally (R. 7). Such a wholesale publicizing to competitors of all of appellant's current business transactions and commodity-movement records, by special order directed only against appellant, is bound to increase enormously competitive pressure on appellant by appellant's competitors in the shipping trust. It is a penalty and unjust discrimination against appellant of the most drastic kind; and no other steamship company is subject to it.

The order requires appellant to file a copy or summary of every business transaction record in its possession, showing every particular commodity carried, and between exactly what points carried, and the rate actually collected, and the date collected or effective, etc. With factual information of that kind from appel-

lant's records, the most stupid competitor could easily identify every customer of appellant and the nature and extent of his business as shown by his designated commodities moving on appellant's vessels between named points at given times. And the Secretary of Commerce has notified appellant in writing that on being filed with him, all of that information from appellant's records will be made public (R. 7). Yet the Secretary of Commerce is a "common carrier by water", being the operator of merchant vessels as common carriers for hire in the same trade in competition with those of appellant, and Section 20 of the Shipping Act, 1916, makes it unlawful for a common carrier by water, or "for any other person authorized by such carrier or person to receive information", to

> "disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, *any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier* or other person subject to this Act for transportation in interstate or foreign commerce, which information *may* be used to the detriment or prejudice of such shipper or consignee, or which *may* improperly *disclose his business transactions to a competitor,* or which *may* be *used to the detriment or prejudice of any carrier;* and *it shall also be unlawful for any person to solicit* or knowingly receive any *such information which may be so used.* Nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States, or of any State, Territory, District, or possession thereof, *in the exercise of his powers,* * * *." (Italics ours.)

It is exactly such "information concerning the nature, kind, quantity, destination, consignee, *or* routing of" property "tendered or delivered to" appellant as a common carrier, that the order of the Secretary of Commerce of November 18, 1935, here involved demands. In other words, unless the Secretary of Commerce is acting "in the exercise of his powers", he is demanding that appellant violate the law and seriously injure every one of the American shippers on appellant's vessels, and also injure appellant's business. What shipper in his right senses would ship goods on appellant's vessels if he knew that appellant alone of all steamship companies was divulging the private business transactions of his shippers to a carrier in the shipping combination or trust whose financial interests were tied up with those of that shipper's competitors who were shipping on conference vessels to the same markets!

And in view of that law on the statute books, how can it be seriously contended that the Secretary of Commerce is acting "in the exercise of his powers" in notifying appellant in writing that all such information, immediately on being filed will be made public to all appellant's competitors and to all its shippers' competitors!

The Secretary of Commerce's order thus constitutes a threat to appellant that, on the one hand, if it complies with the order, it will destroy its own and its customers' business, and, on the other hand, if it does not comply with the order it will be subjected to severe penalties. Appellant was forced to the latter alternative to protect its legal and constitutional rights against the arbitrary and unreasonable seizure and publicizing of its and its customers' private records of current business transactions.

This Record establishes that the Secretary of Com-

merce, by a forced interpretation of his duties under Section 15 of the Shipping Act, 1916, has been in effect establishing and maintaining a shipping trust or complete shipping monopoly in American foreign commerce, —a system of codes or "conference agreements" in ocean shipping. And he has continued in this in the face of the fact that every conference in that monopoly is wholly beyond his power to regulate, because foreign-flag steamship companies constitute a majority dominating every one of the conferences or combinations. The order of November 18, 1935, here involved, is in substance an effort, under threat of heavy penalties, to compel appellant to join the shipping monopoly. Yet Congress plainly provided in Section 15 and other sections of the Shipping Act, 1916, and of the Merchant Marine Act, 1920, that it should be entirely optional and voluntary with a carrier whether or not it should join a conference or combination. Indeed Congress' language indicates an intent to discourage such combinations as monopolies or evils obviously detrimental to the public interest (as this Court has already held in *Thomsen* v. *Cayser,* 243 U. S. 66), and to tolerate them only under special and rare circumstances.

This complaint alleges that the conference companies, including the Secretary of Commerce as a member of the conferences, have entered into monopoly agreements of an "exclusive contract" nature which are identical with the one condemned by this Court as an unlawful restraint of trade in *Thomsen* v. *Cayser,* 243 U. S. 66. That also constitutes unfair competition and unjust discrimination because the Secretary of Commerce is approving, so far as "conference" companies are concerned, a type of coercive rate agreement which it would be unlawful for an independent steamship company to enter into. The "exclusive contract" agreement is in substance that a large rebate will be given to a shipper if he will ship his goods only on vessels

which are members of the conference or shipping trust. The Secretary of Commerce has approved that as fair competition and lawful so far as conference vessels are concerned, but unfair competition and unlawful (as in violation of the "deferred rebate" subdivision of Section 14 of the Shipping Act, 1916) so far as independent or non-conference steamship companies in foreign commerce are concerned and so far as vessels in "intercoastal" commerce are concerned.

Consequently if appellant is compelled to observe the order of November 18, 1935, of the Secretary of Commerce, by divulging to its conference-line competitors all its current rate and commodity-movement transactions between designated points, so that its rates and customers are "known" to them, then they can take all appellant's business away from it by giving a rebate to those shippers in the guise of an "exclusive contract" agreement which it would be illegal for appellant as a non-conference company to enter into with its shippers.

The representatives of the Secretary of Commerce, as operator of vessels entered in the conferences or shipping combinations competing with appellant, vote upon conference decisions. The actions taken as a result of such decisions frequently come before the Secretary of Commerce in his regulatory duties under Section 15 of the Shipping Act, 1916, to decide whether or not such action violates the law (See pp. 386 and 387, Hearings on H. R. 7521, by the House Committee on Merchant Marine and Fisheries, 74th Congress, 1st Session). That is the situation in the present case. The Secretary of Commerce, as alleged without contradiction in the complaint (R. 12, 26), has, as operator of vessels, joined conferences or shipping combinations competing with appellant which have decided to coerce appellant and American exporters by adopting by conference agree-

ment the "exclusive contract" or deferred-rebate system which this Court held in the case of *Thomsen* v. *Cayser,* 243 U. S. 66, was a violation of the Sherman Anti-Trust Law, and which is further condemned in the "deferred rebate" subdivision of Section 14 of the Shipping Act, 1916. The Secretary of Commerce now finds himself embarrassed in his "regulatory" capacity in passing on the question of the lawfulness of an "exclusive contract" system which he himself through his representatives has agreed to and is promoting for the purpose of coercing and unfairly competing with appellant, and for the purpose of compelling American shippers to ship only on vessels belonging to the conferences or shipping combination. He finds himself still more embarrassed in attempting by his order of November 18, 1935, here involved, to compel appellant in practical effect to charge rates fixed by the foreign flag majority in the conferences or shipping monopoly on the basis of that very conference agreement which illegally coerces shippers and independent steamship companies. One solution for such a situation would have been to compel every steamship company to join such a shipping combination, or to observe the combination or monopoly-fixed rates, and thus preclude and estop all of them from questioning the legality of that type of shipping-combination agreement already condemned by this Court. That solution is the one the Secretary of Commerce is attempting by the order here involved. Congress never intended in the Shipping Act, 1916, or other statute, to authorize the regulatory powers of the Shipping Board to be exercised for the purpose of ending all free competition in the steamship business, and of creating or furthering a complete shipping monopoly in American foreign commerce, to the prejudice of independent steamship companies and American shippers;—and especially not when the facts

established by the evidence are that every one of the conferences or combinations is dominated by the foreign-flag "conference" companies constituting the majority. Congress did not intend by Section 15 of the Shipping Act, 1916, to authorize the Shipping Board (or the Secretary of Commerce) to "approve" the very "exclusive-contract" agreement which this Court condemned as illegal and obviously contrary to any reasonable or sound public policy in *Thomsen* v. *Cayser,* 243 U. S. 66, and which Congress condemned in the deferred-rebate subdivision of Section 14 of that same Shipping Act, 1916.

Assuming that the Secretary of Commerce, although a competitor of appellant, could regulate appellant, surely the Secretary could not delegate to appellant's private competitors the Secretary's power of regulating appellant. But that is what was done in substance by the present order, viewed in the light of the uncontradicted evidence and allegation in the complaint that foreign shipowners dominate and control every one of the conferences or shipping combinations and initiate and fix the freight rates in every one of those conferences.

The effect of the present order is, by immediate publication of appellant's current commodity-shipment and rate transaction between designated points, to compel appellant to charge such conference rates by depriving appellant of a reasonable and necessary degree of flexibility or adaptability to actual competitive conditions so far as freight rates quoted or charged by it are concerned.

The Secretary of Commerce's order was not issued so that he could acquire information for his or the Government's guidance in formulating regulations. The order was issued as a regulation itself. The order is in substance and practical effect a broadcasting of the

whole of appellant's current business transactions and of all of appellant's current records of commodity movements between designated places and of actual freight rate transactions with its customers. The order has been issued for the purpose of letting all appellant's competitors and all shippers know what actual business transactions appellant has been conducting and to compel appellant to keep its future freight rates stabilized or fixed at the same level as the conferences or shipping combinations whose rates are initiated and fixed exclusively by the foreign-flag lines which constitute the majority and which are subject to no control or power of regulation by the Secretary of Commerce, excepting a mere veto power, without authority to substitute a reasonable or just rate.

There is no sufficient reason shown for subjecting all of appellant's current business transactions and records to publicity, so that all of appellant's competitors and all shippers can know every business transaction entered into by appellant and by American shippers who have shipped goods on appellant's vessels, and know just what commodities appellant has just carried, and what commodities those American shippers have just sold or have consigned to designated foreign markets.

The conference lines or shipping combinations have power under the order of the Secretary of Commerce of November 18, 1935, to impose their will on appellant. The information from appellant's private records to be made available to them by the terms of this order is sufficient to enable the conference lines to take away from appellant its business in carrying the specified commodities between the places and ports required to be disclosed. The allegations in the complaint, and the evidence introduced, by appellant establishing this are uncontradicted. The evidence is also uncontradicted that a majority in a conference has power, not merely to advise and recom-

mend, but to coerce, and that the majority in each of the conferences competing with appellant consists of foreign lines, the American lines being in each conference a minority. The decision or agreement of the majority in a conference with respect to rates is final and effective and binding on all members of the conference unless disapproved by the Shipping Board (or Secretary of Commerce). The Shipping Board has merely the power of veto or disapproval. It cannot initiate or direct any rate or fix any maximum or minimum rate in foreign commerce. If not disapproved by the Shipping Board the rates filed by the conference are effective, and no hearing is provided for before either the Shipping Board or a Court to find or determine whether or not the rates are reasonable or wise or just. No hearing is provided at which objections to the rates in point of law or policy may be submitted and considered. The rates so fixed for vessels of all companies may be unreasonably high and prejudice slippers and independent steamship companies by throwing all business to the fastest and largest foreign conference line steamers. Or such rates may be made unreasonably low temporarily on the dates of independent line steamer sailings until an unsubsidized independent company like appellant will be driven from the trade or destroyed.

The decision of the majority in a conference represents its own unfettered judgment in furthering its interest and profit.

There is no method available by which appellant can obtain a hearing before the Shipping Board or a Court to have it determined whether such rates—or any existing conference line rates—are reasonable. The conference line rates may be, and are, arbitrarily fixed by the majority in the conference. Such rates may be less than reasonable cost, or less than cost plus reasonable profit, or may be higher than cost plus reasonable

profit. Neither the Shipping Board nor anyone else under the law as it now stands can dictate to the majority in a conference what its rates or tariffs in foreign commerce shall be. The Shipping Board can disapprove any rate schedule or agreement filed with it by the conferences, but it is not required to, and has never, held a hearing at which objections to the conference line rates in point of law or policy could be submitted and considered; and the Record shows no instance in which any conference line rate filed with the Shipping Board or the Secretary of Commerce has ever been disapproved, or a hearing held to determine its reasonableness, or a finding made with respect to its reasonableness. On the contrary the Record shows that the Shipping Board (or Secretary of Commerce) has joined forces with the conference lines and has become a partisan or "faction interested in the event" (*Doty* v. *Love*, 295 U. S. 64, 71) by entering its own vessels in the conferences or shipping combinations, and the Record further shows that these very Shipping Board vessels are operating commercially and are competing with appellant's vessels in the same trade. Any contention therefore that the Shipping Board exercises control over the conference rates to protect shippers or non-conference steamship companies against unreasonable freight rates charged by the conferences, or against unfair competition by the conferences, is without support in the Record.

There is no reasonable or valid ground for this order. But even if there were, there is no occasion to consider whether one or more of the grounds or purposes of the order would be reasonable and valid if separated from the others. When unreasonable and invalid grounds are so piled up as to make the valid ground a shadow, this Court's judgment will be controlled by the underlying reality rather than the form or label. The

grounds now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. *Worthen Co.* v. *Kavanagh,* 295 U. S. 56, 62. So viewed they are seen to be an invalid, oppressive and unnecessary destruction of appellant's right to a reasonable opportunity to compete freely with the Secretary of Commerce's vessels and with the vessels in the shipping combinations or conferences.

Looking to the surface of the order and no farther, it is invalid because no ground is specified to support it. All that the order does upon its face is to recite vaguely that it is issued under the regulatory powers conferred on the Shipping Board by the Shipping Act, 1916, and that it is necessary to know the freight rates which have been charged by all carriers in foreign commerce in order to issue regulations. No reason appears on the face of the order for limiting its application or scope to the appellant company instead of to all carriers in foreign commerce. But the Shipping Act, 1916, expressly limits the Shipping Board's power to regulate freight rates to *interstate* commerce (Section 18, Shipping Act, 1916) excepting that it can approve or disapprove freight rate agreements or schedules in foreign commerce which steamship lines forming conferences or combinations file with it to avoid prosecution under the Sherman Anti Trust Act (Section 15, Shipping Act, 1916). And the Board's power to regulate freight rates has not been extended since that Act excepting in the Intercoastal Shipping Act, 1933, to *intercoastal* commerce (U. S. C., Title 46, Secs. 843-848).

Aside from its powers under Section 15 of the Shipping Act, 1916, the only power given the Shipping Board by the Shipping Act, 1916, (or by any later statute), over freight rates in foreign commerce is not of a regulatory or legislative character, but of a judicial character with respect to offenses committed in violation of the pro-

visions prohibiting acts of unjust discrimination and the giving of deferred rebates, and providing penalties therefor. That judicial power can only be exercised after a proceeding has been instituted before the Shipping Board against the alleged violator. Such proceeding can be instituted by the filing of a complaint with the Shipping Board by a shipper or other person charging a carrier with an act of unjust discrimination, and praying for the imposition of the statutory penalty. Or the Shipping Board may itself act as prosecutor in instituting such a proceeding and claiming such penalty. But no proceeding has ever been instituted against appellant, nor has anyone ever filed a charge against it either before the Shipping Board or before any other commission or court alleging unjust discrimination or other offense by appellant under the Shipping Act or other statute. The order, therefore, cannot be justified on the theory that it is in aid of a judicial proceeding before the Shipping Board, or on the theory that it is a prosecution or proceeding instituted by the Board itself, and to be heard and determined by itself, charging appellant with a violation of any specified provision of the Shipping Act.

Assuming, merely for purpose of argument, that the order is valid on its surface, the question remains whether it has been so interpreted or applied as to bring out defects that were lurking underneath.

> *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289;
> *Merchants' National Bank* v. *Richmond,* 256 U. S. 635, 637;
> *Kansas City So. Ry. Co.* v. *Road Improvement District No. 6,* 256 U. S. 658, 659;
> *Doty* v. *Love,* 295 U. S. 64, 71.

The Record shows no rate war either existing or in the recent past. Nor is there any evidence that appel-

lant or any other carrier has ever charged a freight rate which is less than cost plus reasonable profit such as existed in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 372. Nothing in the nature of an existing evil to be remedied is shown in the record. And any evil that Congress had in mind was nineteen years old because the statute (Section 21 of the Shipping Act, 1916) which the Secretary of Commerce invokes as authority was enacted that long ago.

Section 21 was intended to enable the Shipping Board to acquire information or records in connection with the specific regulatory powers which was conferred on it. The Shipping Board was granted no general power of regulation (such as the General Welfare Clause of the Constitution), and as this Court said in *Carter* v. *Carter,* 298 U. S. 238, we must, if the Secretary will not specify under which regulatory power he is issuing the order, examine each one of the specific regulatory powers granted him to ascertain whether any of them authorizes such an order. This is not difficult to do because only a few regulatory powers are given to the Shipping Board (or Secretary of Commerce), and none whatever (excepting those under Section 15, Shipping Act, 1916, and those not here involved of a judicial nature after complaint filed by a shipper or by proceeding instituted directly by the Board) so far as foreign commerce is concerned.

In case of monopoly the right of the Government to regulate is necessarily primary, and private rights are subordinate. The conferences and shipping combinations are, therefore, properly subjected by Congress to regulation by the Shipping Board. But the appellant is an independent steamship company which is not in any sense a monopoly or part of a monopoly. The Shipping Board's powers of regulation in foreign

commerce are limited to regulating the shipping monopoly created under Section 15 of the Shipping Act, 1916.

The fact that the Shipping Board has itself joined the monopoly which it is regulating is no reason for impliedly giving it power to regulate an independent steamship company which is no part of the monopoly and whose continued existence as an independent company Congress clearly intended and contemplated in the provision in the Shipping Act restricting the Shipping Board's power of regulation to the monopoly or shipping combinations.

There is no limitation in section 15 of the Shipping Act, 1916, that the agreements of the shipping combinations shall not create or promote monopolies such as is contained in the National Industrial Recovery Act of June 16, 1933. And yet that latter Act was rejected by this Court as unconstitutional in the *Schechter* case, 295 U. S. 495.

This order compels appellant to disclose to its competitors all its current business transactions and records or book entries during the six weeks' period preceding the issuance of the order so far as concerns particular commodities carried, and between what points carried, and the rate which has been charged or collected on each of those commodities. With that information as to appellant's business transactions, and as to the trend and exact nature and times of the particular commodity movements, appellant's competitors can easily identify every one of appellant's customers and shipments and can arrange for competing vessels to be present at each of the disclosed shipping points, quoting (until appellant is driven out of business) a rate less than appellant has been able to obtain as shown by its own private books.

There is no restriction imposed by law on the right of appellant's competitors to reduce or change their rates at any time and without notice (until the expiration of thirty days after they have been put into effect), and the Shipping Board (or the Secretary of Commerce) has no authority under the law to impose any such restriction, and has not tried to impose it. The schedules of rates which the steamship companies belonging to the shipping combinations or conferences are required to file with the Shipping Board in order to avoid prosecution for violating the Anti-Trust Law, are not required to be maintained for any fixed period, and can be abandoned by decision of the majority in the combination or conference five minutes after they have been filed. The Shipping Board has no power of initiating or fixing a rate to be charged in foreign commerce by a shipping combination or by any steamship company, that being done by decision of representatives of the majority in the combination. And the Record shows without contradiction that the majority in every one of the combinations consists of foreign shipowners operating foreign flag vessels.

The appellant is the only steamship company in American foreign commerce which has not joined a shipping combination under section 15 of the Shipping Act, 1916, and it desires to continue as such independent or non-conference company. Congress has never said that a steamship company must join a shipping combination, and has never given authority to the Shipping Board to compel appellant to join one.

Indeed Congress plainly intended that free competition should continue between steamship companies engaged in American foreign commerce, and has not authorized the creation or furtherance of a complete shipping monopoly with monopoly-dictated freight rates such as the Secretary of Commerce is attempting

to create by the present order. And the fact that appellant does not wish to join the shipping trust is no reason for the Secretary of Commerce to subject it to unjust discrimination by the order here sought to be enjoined.

The Secretary of Commerce by the present order is attempting to set up a kind of compulsory system of trade codes or conference agreements in the shipping business in American foreign commerce, such as was declared illegal and unconstitutional by this Court in the *Schechter* case, 295 U. S. 495. The Secretary of Commerce has himself joined certain of those shipping combinations by voluntarily entering in them the vessels he is operating in merchant service and thereby becoming with other American vessels a minority member or factor without control (excepting to the extent of a mere veto power over "unlawful" agreements) over the majority consisting of foreign flag shipowners. The present order is in practical effect a form of coercion on appellant to join a shipping combination.

Nor is sufficient reason shown for subjecting appellant to this unjust discrimination, no other steamship company having been subjected to such an order as the present one. No other carrier is required to disclose to either the Secretary of Commerce or to the public or to its competitors the actual commodities it has carried, or the places between which it has carried them, or the rates it has actually charged or collected, or what terminal facility or other service it has afforded. A schedule of rates for the future, which need not be maintained or adhered to in practice, is a very different thing from a complete disclosure of all of a carrier's current business transactions, and of its shippers' business transactions, such as the present order requires.

CONGLUSION.

The final decree of the District Court should be reversed with costs, and the cause should be remanded to the District Court with instructions to enter a final decree in favor of appellant, enjoining premanently the enforcement of the order of the Secretary of Commerce of November 18, 1935.

Respectfully submitted,

JAMES W. RYAN,
Counsel for Appellant.

APPENDIX A.

Economy Act of June 30, 1932, providing in Title III for "Reorganization of Shipping Board", and providing in Title IV for Reorganization of Executive Agencies defined as "any commission, board, bureau, division, service, or office in the executive branch of the Government, but does not include the executive departments mentioned in Title 5, Section 1, United States Code".

The Act of Congress of June 30, 1932, "Making appropriations for the Legislative Branch of the Government for the fiscal year ending June 30, 1933, and for other purposes" (47 U. S. Statutes at Large 382), 72nd Congress, Sess. I., ch. 314,—which has been incorporated in part in the United States Code as U. S. Code, title 5, sections 124 et seq.—provides as follows:

"*Part I.*

Section 1. * * * Senate.

Salaries and mileage of Senators.

* * *

House of Representatives.

Salaries and mileage of Members.

* * *

Capitol Police. * * *
Joint Committee on Printing. * * *
Office of Legislative Counsel. * * *
Statement of Appropriations. * * *
Architect of the Capitol. * * *
Library Building and Grounds. * * *
Botanic Garden. * * *
Library of Congress. * * *
Library Building. * * *
Government Printing Office. * * *

"Part II.

Title I.—Furlough of Federal Employees. Furlough Provisions.

Sec. 101 [to Section 112, inclusive] * * *

Title II.—Provisions affecting Personnel. * * *

Sec. 201 [to Section 216, inclusive] * * *

Title III.—Miscellaneous Provisions.

Philippine Scouts. Sec. 301. * * *

Limitations on expenditures for Printing * * * Sec. 302 [to Section 304, inclusive] * * *

West Potomac Park Heating Plant, Sec. 305 * * *

Reorganization of Shipping Board.

Section 306 (a)

The United States Shipping Board shall be composed of three commissioners to be hereafter appointed by the President, by and with the advice and consent of the Senate. One of such commissioners shall be appointed from the States touching the Pacific Ocean, one from the States touching the Atlantic Ocean, or a navigable river directly tributary thereto, and one from the States touching the Gulf of Mexico, but not more than one shall be appointed from the same State. Not more than two of the commissioners shall be appointed from the same political party.

(b) Terms of office of the first commissioners appointed under this section, shall expire, as designated by the President at the time of nomination, one at the end of one year, one at the end of two years, and one at the end of three years after the date of the enactment of this Act. The term of office of a successor to any such commissioner shall expire three years from the date of the expiration

of the term for which his predecessor was appointed, except that a commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of such term. The commissioners appointed hereunder shall hold office until their successors are appointed and qualify.

(c) Notwithstanding the provisions of subsection (a) the United Shipping Board as constituted upon the date of the enactment of this Act shall continue to function until the date of reorganization of the commission pursuant to the provisions of such subsection. The board shall be deemed to be reorganized upon such date as the three commissioners appointed as provided in such subsection have taken office, and no such commissioner shall be paid salary, as such commissioner, for any period prior to such date.

(d) This section shall be held to reorganize the United States Shipping Board, and, except as herein modified, all laws relating to such board shall remain in full force and effect, and no regulations, action, investigations, or other proceedings under any such laws existing or pending on the date of the enactment of this Act shall abate or otherwise be affected by reason of the provisions of this section.

(e) Whenever under existing law the concurrence of four or more of the commissioners is required, such requirement of law shall, after the reorganization of the board provided by this section, be held to be complied with by the concurrence of two commissioners.

(f) $200,000 of the unexpended balance of the allotment of $500,000 made available to the United States Shipping Board Merchant Fleet Corporation

for experimental and research work, by the Independent Offices Appropriation Act, fiscal year 1930, and continued by subsequent appropriation Acts, shall not be expended, but shall be covered into the Treasury as miscellaneous receipts.

(g) The sums available for expenditure, during the fiscal year ending June 30, 1933, for personal services of employees of the United States Shipping Board Merchant Fleet Corporation assigned to and serving with the United States Shipping Board are reduced by $167,000 from the pay roll of March 31, 1932, and the amounts of reduction applicable to the various bureaus shall be as follows: (1) Bureau of Research, $30,000, (2) Bureau of Law, $103,000, (3) Bureau of Traffic, $9,000, (4) Bureau of Construction, $5,000, and (5) Bureau of Operations, $20,000.

(h) The United States Shipping Board Merchant Fleet Corporation, shall, during the fiscal year ending June 30, 1933, transfer from the operating funds and cover into the Treasury as miscellaneous receipts the sum of $1,938,240.

Increase in Certain Charges and Fees. Sec. 307 [to Section 314, inclusive]. * * *

Restrictions on Transfer of Army and Navy Personnel. Sec. 315. * * *

Statistics concerning Hides, Skins, and Leather. Sec. 316. * * *

Transfer of appropriations. Sec. 317. * * *

Vocation education. Sec. 318. * * *

Rate of interest on judgments and overpayments. Sec. 319. * * *

Restriction of construction and rental of buildings. Sec. 320 [to Section 322, inclusive]. * * *

Temporary reduction of fees of jurors and witnesses. Sec. 323. * * *

Title IV.—Reorganization of Executive Departments.

Declaration of Policy.

Sec. 401. In order to further reduce expenditures and increase efficiency in government it is declared to be the policy of Congress——

(a) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purpose;

(b) To reduce the number of such agencies by consolidating those having similar functions under a single head;

(c) To eliminate overlapping and duplication of effort; and

(d) To segregate regulatory agencies and functions from those of an administrative and executive character.

Definitions.

Sec. 402. When used in this title——

(1) The term 'executive agency' means any commission, board, bureau, division, service, or office in the executive branch of the Government, but does not include the executive departments mentioned in title 5, section 1, United States Code.

(2) The term "independent executive agency" means any executive agency not under the jurisdiction or control of any executive department.

Power of President.

Sec. 403. For the purpose of carrying out the policy of Congress as declared in section 401 of this title, the President is authorized by Executive order——

(1) To transfer the whole or any part of any independent executive agency, and/or the functions thereof, to the jurisdiction and control of an executive department or another independent executive agency;

(2) To transfer the whole or any part of any executive agency, and/or the functions thereof, from the jurisdiction and control of one executive department to the jurisdiction and control of another executive department; or

(3) To consolidate or redistribute the functions vested in any executive department or in the executive agencies included in any executive department; and

(4) To designate and fix the name and functions of any consolidated activity or executive agency and the title, powers and duties of its executive head.

Sec. 404. The President's order directing any transfer or consolidation under the provisions of this title shall also designate the records, property (including office equipment), personnel, and unexpended balances of appropriations to be transferred.

Saving Provisions.

Sec. 405. (a) All orders, rules, regulations, permits, or other privileges made, issued, or granted by or in respect of any executive agency or function transferred or consolidated with any other executive agency or function under the provisions of this title, and in effect at the time of the transfer or consolidation, shall continue in effect to the same extent as if such transfer or consolidation had not occurred, until modified, superseded, or repealed.

(b) No suit, action, or other proceeding lawfully commenced by or against the head of any department or executive agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of any transfer of authority, powers, and duties from one officer or executive agency of the Government to another under the provisions of this title, but the court, on motion or supplemental petition filed at any time within twelve months after such transfer takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the head of the department or executive agency or other officer of the United States to whom the authority, powers, and duties are transferred.

(c) All laws relating to any executive agency or function transferred or consolidated with any other executive agency or function under the provisions of this title, shall, in so far as such laws are not inapplicable, remain in full force and effect, and shall be administered by the head of the executive agency to which the transfer is made or with which the consolidation is effected.

Statutory Agencies.

Sec. 406. Whenever, in carrying out the provisions of this title, the President concludes that any executive department or agency created by statute should be abolished and the functions thereof transferred to another executive department or agency or eliminated entirely the authority granted in this title shall not apply, and he shall report his conclusions to

Congress, with such recommendations as he may deem proper.

Disapproval of Executive Order.

Sec. 407. Whenever the President makes an Executive order under the provisions of this title, such Executive order shall be transmitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall sooner approve of such Executive order or orders by concurrent resolution, in which case said order or orders shall become effective as of the date of the adoption of the resolution: Provided, That if Congress shall adjourn before the expiration of sixty calendar days from the date of such transmission such Executive order shall not become effective until after the expiration of sixty calendar days from the opening day of the next succeeding regular or special session: Provided further, That if either branch of Congress within such sixty calendar days shall pass a resolution disapproving of such Executive order, or any part thereof, such Executive order shall become null and void to the extent of such disapproval: Provided further, That in order to expedite the merging of certain activities, the President is authorized and requested to proceed, without the application of this section, with setting up consolidations of the following governmental activities: Public Health (except that the provisions hereof shall not apply to hospitals now under the jurisdiction of the Veterans' Administration), Personnel Administration, Education (except the Board of Vocational Education shall not be abolished), and Mexican Water and Boundary Commission, and to merge such activities, ex-

cept those of a purely military nature, of the War and Navy Departments as, in his judgment, may be common to both and where the consolidation thereof in either one of the departments will effect economies in Federal expenditures, except that this section shall not apply to the United States Employees' Compensation Commission.

Report to Congress.

Sec. 408. The President shall report specially to Congress at the beginning of each regular session any action taken under the provisions of this title, with the reasons therefor.

Title V.—Particular consolidations effected.

Bureau of Navigation and Steamboat Inspection. Sec. 501 [to Section 504, inclusive]. * * *

Transfer of Personnel Classification Board to Civil Service Commission. Sec. 505 [to Section 508, inclusive]. * * *

International Water Commission Abolished. Sec. 510. * * *

Transfer of Radio Division of the Department of Commerce to the Federal Radio Commission. Sec. 511 [to Section 513, inclusive]. * * *

Title VI.—Interdepartmental Work. Sec. 601 [and Section 602]. * * *

Title VII.—Provisions applicable to Veterans. Sec. 701. * * *

Title VIII.—Special Provisions.

Separability Clause.

Sec. 801. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision

to other persons or circumstances, shall not be affected thereby.

Suspensions and Repeals.

Sec. 802. All Acts and parts of Acts inconsistent or in conflict with those provisions of this Act which are of temporary duration are hereby suspended during the period in which such provisions of this Act are in effect. All Acts or parts of Acts inconsistent or in conflict with those provisions of this Act which are of permanent nature are hereby repealed to the extent of such inconsistency or conflict.

Provisions of Part 2 Applicable to Appropriation Acts for Fiscal Year 1933.

Sec. 803. The provisions of Part 2 herein are hereby made applicable to the appropriations available for the fiscal year 1933, whether contained in this Act or in Acts prior or subsequent to the date of the approval of this Act. Approved, June 30, 1932." (Black face type in Titles III and IV ours.)

APPENDIX B.

Amendment of March 3, 1933, to Economy Act of June 30, 1932, amending Title IV in several respects and changing definition of Executive Agency to read: "Any commission, independent establishment, board, bureau, division, service, or office in the executive branch of the Government and, except as provided in Section 403, includes the executive departments"; but not amending or repealing Title III of the Economy Act of June 30, 1932.

The Act of Congress of March 3, 1933, "Making appropriations for the Treasury and Post Office Depart-

ments for the fiscal year ending June 30, 1934, and for other purposes" (47 U. S. Statutes at Large 1489), 72nd Congress, Sess. II., ch. 212, provides as follows:

"**Title I.**—Treasury Department. * * *

Title II.—Post Office Department. * * *

Sec. 2. [Appropriations for travel expenses] * * *

Sec. 3. [Restrictions on expenditures for automobiles] * * *

Sec. 4. [Continuing in force for another year sections 101 to 109, 112, 201, 203, 205, 206, 211, 214, 216, 304, 315, 317, 318, and 323 of the Legislative Appropriations Act, fiscal year 1933, etc.] * * *

Sec. 5. [Limitation on reduction of annual compensation] * * *

Sec. 6. [Annual leave provisions] * * *

Sec. 7. [Administrative promotions] * * *

Sec. 8. [Annuity of officers reaching retirement age] * * *

Sec. 9. [Allowance for motorcycles and automobiles] * * *

Sec. 10. [Travel expenses] * * *

Sec. 11. [Saturday half holiday] * * *

Sec. 12. [Foreign assignments of Army officers] * * *

Sec. 13. [Judgments recovered against United States under Act of March 3, 1875] * * *

Section 14. Section 319 of Part II of the Legislative Appropriation Act, fiscal year 1933, is repealed as of June 30, 1932; and the rate of interest to be allowed upon judgments against

the United States and overpayments in respect of internal-revenue taxes shall be the rate applicable thereto prior to the enactment of section 319 of such Act.

Sec. 15. Section 322 of Part II, of the Legislative Appropriation Act, fiscal year 1933, is amended by adding at the end of the section the following proviso: 'Provided further, That the provisions of this section as applicable to rentals, shall apply only where the rental to be paid shall exceed $2,000 per annum.'

Sec. 16. Title IV of Part II of the Legislative Appropriation Act, fiscal year 1933, is amended to read as follows:

'Title IV.—Reorganization of Executive Departments

'Declaration of Standard

'Sec. 401. The Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accomplished in great measure by proceeding immediately under the provisions of this title.

'Accordingly, the President shall investigate the present organization of all executive and administrative agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes:

'(a) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;

'(b) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;

'(c) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purposes;

'(d) To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government;

'(e) To eliminate overlapping and duplication of effort; and

'(f) To segregate regulatory agencies and functions from those of an administrative and executive character.

'Definition of Executive Agency

'Sec. 402. When used in this title, the term "executive agency" means any commission, independent establishment, board, bureau, division, service, or office in the executive branch of the Government and, except as provided in section 403, includes the executive departments.

'Power of President.

'Sec. 403. Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by Executive order—

'(a) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;

'(b) Consolidate the functions vested in any executive agency; or

'(c) Abolish the whole or any part of any executive agency and/or the functions thereof; and

'(d) Designate and fix the name and functions of any consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof.

'Sec. 404. The President's order directing any transfer, consolidation, or elimination under the provisions of this title shall also make provision for the transfer or other disposition of the records, property (including office equipment), and personnel, affected by such transfer, consolidation, or elimination. In any case of a transfer or consolidation under the provisions of this title, the President's order shall also make provision for the transfer of such unexpended balances of appropriations available for use in connection with the function or agency transferred or consolidated, as he deems necessary by reason of the transfer or consolidation, for use in connection with the transferred or consolidated function or for the use of the agency to which the transfer is made or of the agency resulting from such consolidation.

'Saving Provisions.

'Sec. 405. (a) All orders, rules, regulations, permits, or other privileges made, issued, or granted by or in respect of any executive agency or function transferred or consolidated with any other executive agency or function under the provisions of this title, and in effect at the time of the transfer or consolidation, shall con-

time in effect to the same extent as if such transfer or consolidation had not occurred, until modified, superseded, or repealed.

'(b) No suit, action, or other proceeding lawfully commenced by or against the head of any executive agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of any transfer of authority, power, and duties from one officer or executive agency of the Government to another under the provisions of this title, but the court, on motion or supplemental petition filed at any time within twelve months after such transfer takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the head of the executive agency or other officer of the United States to whom the authority, powers, and duties are transferred.

'(c) All laws relating to any executive agency or function transferred or consolidated with any other executive agency or function under the provisions of this title, shall, in so far as such laws are not inapplicable, remain in full force and effect, and shall be administered by the head of the executive agency to which the transfer is made or with which the consolidation is effected.

'Winding Up Affairs of Agencies.

'Sec. 406. In the case of the elimination of any executive agency or function, the President's order providing for such elimination shall make provision for winding up the affairs of the executive agency eliminated or the affairs of the executive agency with re-

spect to the functions eliminated, as the case may be.

'Effective Date of Executive Order.

'Sec. 407. Whenever the President makes an Executive order under the provisions of this title, such Executive order shall be submitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall by law provide for an earlier effective date of such Executive order or orders; Provided, That if Congress shall adjourn before the expiration of sixty calendar days from the date of such transmission such Executive order shall not become effective until after the expiration of sixty calendar days from the opening day of the next succeeding regular or special session.

'Appropriations Impounded.

'Sec. 408. The appropriations or portions of appropriations unexpended by reason of the operation of this title shall not be used for any purpose but shall be impounded and returned to the Treasury.

'Termination of Power.

'Sec. 409. The authority granted to the President under section 403 shall terminate upon the expiration of two years after the date of enactment of this Act unless otherwise provided by Congress.'

'Sec. 17. The Bureau of Efficiency and the office of chief of such bureau are hereby abolished; and the President is authorized to designate another officer to serve in place of the Chief of the Bureau of Efficiency on any board, commission, or other agency of which the Chief

of the Bureau of Efficiency is now a member. All records and property, including office furniture and equipment of the bureau, shall be transferred to the Bureau of the Budget. Appropriations and unexpended balances of appropriations available for expenditure by the Bureau of Efficiency shall be impounded and returned to the Treasury. This section shall take effect at the beginning of the third calendar month after the passage of this Act.

'SEC. 18. So much of sections 9 and 10 of the Act entitled 'An Act to readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service', approved June 10, 1922 (U. S. C., title 37, secs. 13 and 16), as provides for the payment of enlistment allowance to enlisted men for reenlistment within a period of three months from date of discharge is hereby suspended as to reenlistments made during the fiscal year ending June 30, 1934.

'SEC. 19. (a) The Court of Claims of the United States is authorized and directed, under such rules as it may prescribe, to impose a fee in an amount not in excess of $10 to be fixed by the court for the filing of any petition in any case instituted after the enactment of this Act, and for the hearing of any case before the court, a judge, or a commissioner thereof, pending at the time of the enactment of this Act.

'(b) The court is authorized and directed to charge and collect a fee of 10 cents a folio for preparing and certifying a transcript of the record for the purpose of a writ of certiorari

sought by the plaintiff and for furnishing certified copies of judgments or other documents in cases in said court: Provided, That not less than $5 shall be charged for each certified copy of findings of fact and opinion of the court to be filed in the Supreme Court of the United States.

'(c) The court is also authorized and directed to charge and collect for each certified copy of its findings of fact and opinion a fee of 25 cents for five pages or less, 35 cents for those over five and not more than ten pages, 45 cents for those over ten and not more than twenty pages, and 50 cents for those of more than twenty pages.

'(d) The clerk of the Court of Claims shall account to the Attorney General for all such fees and shall deposit such fees to the credit of the Treasurer of the United States in the same manner as is provided in the case of collections by clerks of district courts as provided by section 9 of the Act entitled "An Act to fix the salaries of clerks of the United States district courts and to provide for their office expenses, and for other purposes", approved February 26, 1919, as amended (U. S. C., title 28, sec. 567).'

Title III.

SEC. 1. That when used in this title—

(a) The term 'United States', when used in a geographical sense, includes the United States and any place subject to the jurisdiction thereof;

(b) The terms 'public use', 'public building', and 'public work' shall mean use by,

public building of, and public work of, the United States, the District of Columbia, Hawaii, Alaska, Puerto Rico, the Philippine Islands, American Samoa, the Canal Zone, and the Virgin Islands.

Sec. 2. Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

Sec. 3. (a) Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and

only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States except as provided in section 2: Provided, however, That if the head of the department or independent establishment making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article, material, or supply, and a public record made of the findings which justified the exception.

(b) If the head of a department, bureau, agency, or independent establishment which has made any contract containing the provision required by subsection (a) finds that in the performance of such contract there has been a failure to comply with such provisions, he shall make public his findings, including therein the name of the contractor obligated under such contract, and no other contract for the construction, alteration, or repair of any public building or public work in the United States or elsewhere shall be awarded to such contractor, subcontractors, material men, or suppliers with which such contractor is associated or affiliated, within a period of three years after such finding is made public.

Sec. 4. This title shall take effect on the date of its enactment, but shall not apply to any contract entered into prior to such effective date.

Sec. 5. If any provision of this Act, or the application thereof to any person or circum-

stances, is held invalid, the remainder of the Act, and the application thereof to other persons or circumstances, shall not be effected thereby.

Approved, March 3, 1933."

APPENDIX C.

Amendment of March 20, 1933, to Economy Act of une 30, 1932, amending Title IV with respect to submission to Congress while in session of Executive Orders ssued under Title IV of the Economy Act of June 30, 932; but not amending or repealing Title III of the conomy Act of June 30, 1932.

The Act of Congress of March 20, 1933 "to maintain ne credit of the United States Government" (48 U. S. tatutes at Large 16), 73rd Congress, Sess. II, Chapter provides as follows:

"AMENDMENTS TO LEGISLATIVE APPROPRIATION ACT, FISCAL YEAR, 1933.

Section 1. Sections 407 and 409 of Title IV of Part II of the Legislative Appropriation Act, fiscal year 1933, as amended by section 17 of the Treasury and Post Office Appropriation Act, approved March 3, 1933, are amended to read as follows:

'Sec. 407. Whenever the President makes an Executive order under the provisions of this title, such Executive order shall be submitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall by law provide for an earlier effective date of such Executive order or orders.

'Sec. 409. No Executive order issued by the President in pursuance of the provisions of section 403 of this title shall become effective unless transmitted to the Congress within two years from the date of the enactment of this Act.'

Approved, March 20, 1933."

APPENDIX D.

Legislative Debates in Congressional Record.

Senator White stated (Cong. Rec., Vol. 77, p. 6154):

"MR. WHITE. Mr. President, I shall not undertake to offer an amendment to the proposal made by the Senator from Oregon. I cannot, however, permit this joint resolution to pass without indicating my grave doubt as to the wisdom of transferring in their entirety the functions and the responsibilities of the Shipping Board to the Department of Commerce.

The Shipping Board and the Emergency Fleet Corporation have a multitude of duties and responsibilities. There are many operative functions of both which I think might well be transferred to the Department of Commerce, but the Shipping Board is a regulatory body, having quasi-judicial functions. It has a wide range of authority over water rates in both interstate and foreign commerce. It has jurisdiction, and it acts, when it exercises that jurisdiction, in a judicial capacity, over rates, rebates, discriminations, preferences and practices of water carriers and all manner of questions of that sort. *It is utterly inconceivable to me that those authorities can properly be transferred to and be exercised by an official of the Department of Commerce.*

> I have grave fear that whatever of value there is in the present law, with respect to the regulation and control of rates and practices of steamship companies in both our interstate and in our foreign commerce will be lost by this wholesale transfer. I fear we shall, by this transfer, render ineffective a large body of law designed to control water carriers and to protect shippers. I want this expression of my views to be of record." (Italics ours.)

The quotation at page 68 of respondents' brief from Representative Mapes' statement in the Congressional Record (Cong. Rec., Vol. 75, Pt. 8, p. 9264) is not a fair summary of Mr. Mapes' statements in the Congressional Record taken as a whole. He later (evidently after more careful investigation and consideration of the matter) stated (Cong. Rec., Vol. 76, p. 3945 under date of February 10, 1933):

> "This and preceding Congresses have refused to give the President power to reorganize the departments, to say nothing of abolishing them; and it should be kept in mind that this administration has never asked Congress to clothe the President with any such power as is proposed in the Senate amendment. Among other objections to the provision *there is serious doubt as to its constitutionality.* The independent commissions and the bureaus in the different departments have been created by express statutory enactments. Can they be abolished without the passage of legislation expressly repealing the statutes which created them?" (Italics ours.)

Representative Snell stated (Cong. Rec., Vol. 76, p. 3943, under date of February 10, 1933):

> "As far as I know, the present President has never suggested that he be given the *right to absolutely abolish definite functions of the Government*

that have been established by law, certainly not without a review by Congress." (Italics ours.)

Representative Whittington stated (Cong. Rec., Vol. 76, p. 4695) under date of February 21, 1933:

"I favor the reorganization provisions. The President will be given the power and authority to group, coordinate, and consolidate executive and administrative agencies, to reduce the number of such agencies by consolidation, those having similar functions under a single head, to eliminate overlapping, and to segregate regulatory agencies and functions from those of executive and administrative agencies.

The President would be given the power to transfer, consolidate, or abolish executive agencies or the functions thereof, with the further power to designate and fix the names and functions of any consolidated agencies.

The economy act of 1932 conferred substantially the same power upon the President. That act did not give the President the power to abolish any statutory agency. He was requested to make recommendations to Congress relating to the abolition of any agency or bureau of statutory origin. On December 9, 1932, President Hoover made recommendations for certain transfers and consolidations. It is worthy of note that he merely recommended the abolition of some three or four insignificant statutory agencies. Among all the 58 consolidations he recommended the abolition of 3 or 4 statutory agencies, to wit, the Office of Public Buildings and Parks, the Employees' Compensation Commission, and the board of trustees of National Training School for Boys.

The President is given power respecting executive agencies. Under the provisions of the amendment the President has no authority to abolish or

transfer any executive department or the functions thereof.

Executive departments are established by law. Executive agencies and departmental bureaus are generally established by Executive orders. The power thus conferred by the President is very largely the power to consolidate, eliminate, or abolish the agencies established by the Executive, rather than by Congress. If the President has the inherent power to establish an agency within a bureau or an executive department, it must follow that he has the power to eliminate or abolish." (Italics ours.)

Representative Woodrum stated (Cong. Rec., Vol. 76, p. 3946):

"An examination of the plan the President sent to Congress showed the remarkable and startling fact that he had taken bureaus and activities one after another and slapped them together without once conferring or advising with the heads of the respective departments or anybody in Congress who ought to have accurate information as to what the effect of that consolidation would be.

I can name bureau after bureau that the President undertook to consolidate without ever securing accurate information from the activities affected."

Representative Wood stated (Cong. Rec., Vol. 76, pp. 4687-4692, under date of February 21, 1933):

"Mr. Wood of Indiana. Mr. Speaker, I appreciate the situation in which we find ourselves with reference to economizing in the expenses of government. I wish I had time to lay the responsibility for our present condition where it belongs.

The Constitution of the United States very definitely prescribed three distinct attributes of

government—the legislative, the executive, and the judicial. If this Government is to endure these three distinctions must be maintained.

I appreciate the fact that the Government is expending today more money than it should be expending for the conduct of its affairs. I appreciate the fact that there is duplication and overlapping in almost every department. I appreciate the fact that it is a great trial to destroy and undo these things. I appreciate the fact that this Congress is now confronted, as perhaps it never before has been confronted, with the responsibility of undoing that for which it is responsible.

There is not a waste in the Government but what the Congress of the United States is responsible for. There is not a duplication in government but what the Congress of the United States is responsible for. There is not an overlapping of jurisdiction but what the Congress of the United States is responsible for. Not one of these things ever could have existed but for the action of Congress.

Time and again I have inveighed against the practice of Congress in creating bureaus or commissions and giving them the right to adopt rules and regulations for their conduct. This practice has gone on to such an extent that we find ourselves today not a democratic form of government, but a bureaucratic form of government; and we can not deny our responsibility or the responsibility of the Congresses that have gone before us.

It occurs to me that by reason of this responsibility it is the part of cowardice for this Congress now to say that we are not capable of undoing, or able to undo, the evil that Congress has created. [Applause.] To do so is to confess that this branch of the Government founded by the fathers has become impotent. If it be so, how long in the future will it be until this branch of Government may say

that the judicial part of it likewise has become impotent? * * *

There have been inflictions upon the Constitution here before. They were had during a period of stress far greater than that in which we now find ourselves. Some of them were had within the memory of many now living, within the knowledge of all of you who have read the history of the Civil War. The Constitution of the United States was then violated, violated, and violated again and again because of the necessity of war. Does that necessity now exist? Are we to confess that we are in a state of war? We are possibly in a condition incident to the necessities of war, but we are not in a position to give ourselves the right to take advantage of the necessities of war, unless we confess our utter inability to solve this peace-time problem.

* * * We are not in a position to give ourselves the right to take advantage of the necessities of war, unless we confess we are not any longer enabled by the legislative branch of this Government to do for the interests of the Government that which we are bound to do under the Constitution of the United States.

* * *

Now, are we to say that by reason of the distress in which we find ourselves we are going to abdicate the duties imposed upon the Congress of the United States in controlling the purse strings of this Government, which are the greatest guarantee of the people in security of a democratic government, and say that we are unable to longer control the expenditures of government or longer control the functions of government, and that we are going to abdicate and put all these things in the hands and power of one man?

I say to confess that is to confess that this form

of government of ours is a failure, and to confess that we have started upon the period of our decadence.

I wish to call your attention to something that was said by the Supreme Court of the United States some years ago which is just as patent now as it was at the time when the utterance was made.

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government within the Constitution has all the powers granted to it which are necessary to preserve its existence as has been happily proved by the result of the great effort to overthrow its just authority.

There has been trial after trial to overthrow the authority of this Government. There has been attempt after attempt to overthrow the duties imposed upon the three divisions of our Government. Happily, up to this time, with here and there an exception, we have maintained these three distinct attributes of our Government that have made us what we are. If they are to be destroyed now or if we are to attempt to undermine them now, we will be responsible for the consequences that are sure to come.

This was said by Mr. Bryce 40 years ago when he wrote his wonderful book, and I wish every right-thinking man would read it and ponder its provisions now. What was said then seemed to be

merely conjectural, but now seems to be prophecy ripening into fulfillment.

He thought then, as I believe now, that if this Government is to endure it will be because of our adherence to our three fundamental principles and divisions of government. * * *

I also invite your attention to the following citation from the American Commonwealth, by Bryce, volume 2, pages 711, 712, and 713:

> The next question to be asked relates to the component parts of the National Government itself. Its equilibrium stands now as stable as at any former epoch. Yet it has twice experienced violent oscillations. In the days of Jackson, and again in those of Lincoln, the Executive seemed to outweigh Congress. In the days of Tyler Congress threatened the Executive, while in those of Andrew Johnson it reduced the Executive to impotence. That no permanent disturbance of the balance followed the latter of these oscillations shows how well the balance had been adjusted at starting. At this moment there is nothing to show that any one department is gaining on any other. The judiciary, if indeed the judges can be called a political department, would seem to have less discretionary power than 70 years ago, for by their own decisions they have narrowed the scope of their discretion, determining points in which, had they remained open, the personal impulses and view of the bench might have had room to play.
>
> Congress has been the branch of government with the largest facilities for usurping the powers of the other branches, and probably with the most disposition to do so. Congress has constantly tried to encroach both on the Executive and on the States, sometimes, like a wild bull driven into a corral, dashing itself against the imprisoning

walls of the Constitution. But although Congress has succeeded in occupying nearly all of the area which the Constitution left vacant and unallotted between the several authorities it established, Congress has not become any more distinctly than in earlier days the dominant power in the State, the organ of national sovereignty, the irresistible exponent of the national will. In a country ruled by public opinion, it could hold this position only in virtue of its capacity for leading opinion, that is to say, of its courage, promptitude, and wisdom. Since it grows in no one of these qualities, it wins no greater ascendancy; indeed its power, as compared with that of public opinion, seems rather to decline. Its division into two coordinate Houses is no doubt a source of weakness as well as of safety. * * *

The weakness of Congress is the strength of the President. Though it can not be said that his office has risen in power or dignity since 1789, there are reasons for believing that it may reach a higher point than it has occupied at any time since the Civil War. The tendency everywhere in America to concentrate power and responsibility in one man is unmistakable. There is no danger that the President should become a despot, that is, should attempt to make his will prevail against the will of the majority. But he may have a great part to play as the leader of the majority, and the exponent of its will.

He is in some respects better fitted both to represent and to influence public opinion than Congress is. No doubt he suffers from being the nominee of a party, because this draws on every act he does the hostility of zealots of the opposite party. But the number of voters who are not party zealots increases—increases from bad causes as well as from good causes—for as a capable President sways the dispassionately

patriotic, so a crafty President can find means of playing upon those who have their own ends to serve. A vigorous personality attracts the multitude, and attracts it the more the huger it grows; while a Chief Magistrate's influence excites little alarm when exerted in leading a majority which acts through the constitutional organs of government. There may, therefore, be still undeveloped possibilities of greatness in store for the Presidents of the future. But as these possibilities depend, like the possibilities of the British and German Crowns—perhaps one may add of the papacy—on the wholly unpredictable element of personal capacity in the men who may fill the office, we need speculate on them no further.

Will we not lose the respect and confidence of the Nation if we make an abject surrender of our right to legislate and confer this authority upon one man?

* * *

While I realize the extremis in which we are placed, while I realize the necessity of retrenchment, do not let us adopt, without due consideration, a temporary cure that will be a disease that will undermine like a cancer and destroy the fabric of the Government that our fathers established—not for us but for the generations yet to come. Let us not adopt something new and untried in the history of government, but let us be sure that our government of the people, by the people, and for the people is to endure.

Mr. McGugin. Will the gentleman yield?

Mr. Wood of Indiana. I yield.

Mr. McGugin. I am in full sympathy with what the gentleman has to say as a matter of Government principle, but does the gentleman have any idea from his long experience in Congress that Congress will materially reduce the expenses of Government or consolidate any bureaus of Government?

Mr. Wood of Indiana. I do not know whether it will or not. It depends upon the courage of the individual Congressman. [Applause.] It depends largely upon the sentiment of his constituents behind him.

I wish the whole country might know the extremis which we are in. They do not know it. I wish they might know the problems that we are called upon to meet. They do not know them. I wish we might be impressed with the responsibility that is resting upon us. I wish that the incoming President might realize, as I fear he does not, the responsibility that is his, because on his shoulders is going to be placed the greatest responsibility of government that has ever befallen any man that has ever become President of the United States with the possible exception of Lincoln.

Mr. Rich. Will the gentleman yield?

Mr. Wood of Indiana. I yield.

Mr. Rich. The gentleman has made the statement that if we, as Congressmen, realized our responsibility, we might be able to reduce Government expenditures. I feel from what we have accomplished during this session of Congress, it is hard to cause Congress to realize its responsibility, and when it is said that taxation is resting so hard upon the shoulders of the people of this country, the only thing to do is to reduce expenses, and how are we going to do this if Congressmen will not assume their responsibility?

Mr. Wood of Indiana. Well, that is the fault of the Congress itself. I am not here for the purpose of defending anybody's proposal, but I am here to charge this Congress with the responsibility of meeting the problem that is before it, and we are not doing it. We are putting it off to another day, we are putting it off to the next session of the Congress of the United States. We are shirking our responsibility.

Now I wish to call your attention to a few more details.

February 21, 1932, one year ago today, the Democratic National Committee issued a statement by John N. Garner, Speaker of this House, criticizing President Hoover for his economic program. The closing paragraphs of that statement contain the following:

> Now he (Hoover) has sent us a recommendation for the reorganization of the Government. Briefly, it consists in a suggestion that Congress abdicate its prerogatives and give him blanket power to appoint a lot of new officers and make the Government anything he pleases. Why did he not send us his actual program? * * * Why has he not told us what he proposes doing, so that we could accurately judge of the value of his suggestions, instead of adopting his proposal that we leave it all to him. Well, we are not going to grant any such unlimited charter. We, too, have our ideas as to how to effect improvements and economies in the national administration. If the President is sincerely desirous of such improvement, there is no reason why we should not get together. If he did that, we could cooperate. What he seeks, instead, is to dictate, and nobody can dictate to the Democratic group in Congress.

Think of it! The gentleman from Texas [Mr. Garner] was criticizing the President's asking to leave it all to him.

Now what are you doing? The President of the United States never asked to destroy a single function of the Government; he never asked for the power now asked to destroy a single attribute of the Government. All he asked was the power to consolidate and amalgamate by preventing overlapping and preventing duplication, and thus save expense to the Government.

You are asked to give power to your President, and he is my President as well; you are asking that he be given authority, not only to do these things which the present President asked, but also that he be given power to destroy.

That is not and should not be a function under the Constitution lodged in the President. If you give him the power to destroy, you must give him the power to create. If he has the right to destroy any given departments of the Government, he has the right to create some other department of that Government.

That we deny. The Constitution denies it, and to admit it is to abdicate the functions of the Constitution imposed upon us.

* * *

The simon-pure Democracy of neither the Baltimore Sun nor Mr. Kent can be disputed. In fact, the Baltimore Sun is the only outstanding Democratic paper in this section of the United States, and opinions are quoted in Democratic councils throughout the country. Mr. Kent says:

> It is a more or less amazing spectacle to see Democratic leaders, on the eve of their party's coming into control of the Congress, throwing up their hands and publicly saying in effect: 'We can not be trusted to do what we were elected to do. Despite our control of both branches of the Congress, we will never be able to function. The only thing to do is to take away the power the Constitution of the United States gives us and put it in the hands of the President. We can't be trusted. We can't even trust ourselves. We have control, but we can't use it.'
>
> Mr. Kent continues:
>
> If ever there was a more extraordinary confession by public leaders of their own incapacity than this, it can not be recalled. Yet the facts

as made plain at this session amply justify it, and if an abdication does not take place by March 4; it will only be because of Republican opposition.

That was the Democratic attitude in 1880. Now they turn about and advocate your giving the President more power than it ever gave a king, except in the days of absolute kingdoms. No democracy was ever confronted with such a proposition that we are now confronted with.

For years the Democratic Party has gone before the public in each national campaign with the catchy slogan, 'Let the People Rule,' and pretended it was a party which was opposed to anything but the most simon-pure democratic form of government. * * *

And now you are not only misusing your delegated power but you are delegating the power that the people gave to you. You are abdicating your responsibility and the duties imposed upon you by the Constitution under the provisions of the bill now before us.

* * *

The reason for this action today is not that which is offered in explanation for it or in extenuation of it. It is offered not for the purpose of increasing the efficiency of the Federal Government. The real explanation is that given by Mr. Kent, namely, that the Democratic Party as it exists today in Congress finds itself utterly unable to legislate along the lines it pledged the people it would legislate. Its membership finds itself totally incapacitated to perform the legitimate functions that the legislative branch of this Government is, under the Constitution, mandated to perform. Again I do not desire this severe stricture to be charged up against Republican partisanship. I make this charge upon the authority of no less a distinguished Democrat than John N.

Garner, present Speaker of the House and Vice President elect. On the 8th day of this month the public press carried a statement issued by Mr. Garner, in which he said:

> It has been actually demonstrated the Congress can not reduce Government expenses as it should be done. There are three or four outstanding organized minorities in this country which work to prevent Congress from effecting reorganization and economy.

And right here let me say that Mr. Garner expressed the truth when he said that this Congress is controlled by minority representation in this country, and it is one of the curses of this country. There is no organization representing the people, but we have minority organizations representing every kind of selfish interests constantly prevailing upon each individual Member of this Congress by every means possible to do their bidding.

Mr. Speaker, in the language I have quoted from Mr. Garner we find an admission by the leader of the Democratic Party in this House that the Democratic Congress can not perform the duties it was elected to perform, can not redeem its promises made to the people, can not perform those functions that the Constitution vests in it, because a few minorities will not permit it to do so. The Speaker admits that this Congress can not economize, will not economize, and therefore the power of Congress must be abdicated.

But that is not what you Democrats wrote in your last national platform. Here is what you said:

> We advocate an immediate and drastic reduction of governmental expenditures by abolishing useless commission and offices, consolidating departments and bureaus and eliminating extrava-

gance, to accomplish a saving of not less than 25 per cent in the cost of the Federal Government.

The President elect did not write that platform, although he did accept it and indorse it 100 per cent. You gentlemen controlled the committee on resolutions at Chicago which drafted that platform, and those within the sound of my voice helped pen the paragraph. There was nothing in there that you advocated a 25 per cent reduction of Federal expenses, provided a few organized minorities would let you. There was nothing in that plank which stated that you intended to pass the buck to the President and make him a dictator in a last desperate attempt to redeem your platform pledges.
* * *

The duty of making a study and recommending a reorganization of the governmental agencies, for which the special Economy Committee was appointed by Speaker Garner last February, a year ago last week, has not been performed. The failure of that performance is not attributable to the Republican President or to the Republican administration or to the Republican membership of this House. The failure of that committee to perform the duties it was advertised to perform lies at the door of the majority of that committee and the Democratic leadership in this House. The extravagances and waste which Representative Crisp said that even the newest Congressman or the merest child could see remain untouched. Why? Because, as Speaker Garner stated on the 8th day of this month, this Congress finds itself incapacitated to perform its sworn duty as representatives of the American people, and then, to make a bad matter worse, it proposes by legislative enactment to do just exactly as Mr. Kent said:

Vote the powers given it by the Constitution

back to the President and abdicate as the legislative branch of the Government.

* * *

Mr. Ludlow: Mr. Speaker, I agree with the able gentleman from Indiana [Mr. Wood] that the proposal before the House to give to the President great powers to reorganize the Government, including the power 'to abolish the whole or part of any executive agency,' is of epochal significance. It does indeed involve the delegation of vast power to the President, but it is the first real approach to an accomplishment for which the whole country is crying in no uncertain terms, namely, the elimination of bureaucracy and its despotic interference with the rights of business and individuals and the stoppage of the astounding wastes and extravagances that are incident to and inseparable from bureaucratic activities. It is the first effort in that direction that promises any results of real value.

* * *

The people have a well-defined impression that the Federal bureaucracy is in no small degree to blame for their ills. * * * They want the President given the power that is sought to be conveyed to him in this conference agreement to abolish nonessential activities and they will hold the President and the Congress jointly responsible if the next few years do not witness the sharpest retrenchment in Government expenditures of any like period in the history of the country.

The average American has more wisdom and knowledge in connection with governmental affairs than he is generally credited with possessing. He knows that the beautiful structure of government handed down to us as a priceless heritage by the founding fathers has become covered with bureaucratic and extraconstitutional malformations until it can no longer function simply and economically

and with direct benefit to the people as it was intended to do, and they want these excrescences stricken off of it. I hold in my hand a most interesting book, which I obtained from the Library of Congress. It is a volume entitled: 'List of Federal Commissions, Committees, Boards, and Similar Bodies Created During the Period September 14, 1901, to March 4, 1929.' This book is not up to date and does not include any commissions created since March 4, 1929. The four years not covered by the book mark an era notable for paternalistic expansion, and necessarily there are many commissions, boards, and so forth, in existence that were born too late to be included in it. Nevertheless, it is amazing to know that the mere cataloguing of the partial and incomplete list of boards and commissions whose names are printed in this volume makes a book of 147 pages.

The people of America expect President-elect Roosevelt to deflate this enormous bureaucratic balloon, and the conference agreement now before the House gives him the tools to do this important job. *I know it has been said by very able gentlemen that the delegation of such enormous power to the executive head of the Government is not in keeping with the democratic philosophy on which this Nation was founded, and I have a great deal of sympathy with that point of view.* But neither is this great, all-powerful, ultra-paternalistic bureaucracy that has grown up in Washington in keeping with the democratic philosophy of government on which this Nation was founded. The founding fathers had the wise idea that all of the *administrative* functions of government should be transacted through the Executive and the departments. There are now 10 great departments, each with a Cabinet official at its head; but added to and superimposed upon this fundamental struc-

ture of Government are bureaucracy's contributions throughout the years, consisting of more than 500 commissions, boards, independent establishments, and whatnot that reach out into every field of paternalistic activity, comprising the most stupendous and costly bureaucracy in history. So, since the ill is extraordinary, it requires an extraordinary cure, and that cure is provided in the pending conference report. * * *

There are those who claim the delegation of so much power to the President is dangerous and who raise the bogey cry of 'dictator', but I am not scared by such hobgoblins. President Wilson was given tremendous war-time power, but it did not make dictators out of his successors in office."

APPENDIX E.

Shipping Board's Report to Congress Dated December 1, 1933.

The Seventeenth Annual Report of the United States Shipping Board to Congress, dated December 1, 1933, for the fiscal year ended June 30, 1933 (House Document No. 124, 73rd Congress, 2nd Session; Government Printing Office, Washington, 1933), submitted by the United States Shipping Board Commissioners (Hutch I. Cone, Chairman, David W. Todd, Vice Chairman, and Gatewood S. Lincoln, Commissioner), states at pages 3 to 5 as follows:

"THE UNITED STATES SHIPPING BOARD

ORGANIZATION

On July 1, 1932, the United States Shipping Board was composed of the following members: T. V. O'Connor, chairman; S. S. Sandberg, vice

chairman; and Commissioners H. I. Cone, Albert H. Denton, Jefferson Myers, and R. K. Smith, there being one vacancy on the Board.

T. V. O'Connor, Great Lakes, was appointed a member June 9, 1921, term 5 years; reappointed June 15, 1926, for a term of 6 years from June 9, 1926; nominated June 20, 1932, for a term to expire June 8, 1938, confirmed on June 20, 1932. Mr. O'Connor was elected vice chairman of the Board on June 16, 1921, and on February 5, 1924, was designated chairman. S. S. Sandberg, Pacific coast, was appointed for a term of 6 years from June 9, 1928, succeeding P. S. Teller; term to expire June 8, 1934. On April 6, 1932, Mr. Sandberg was elected vice chairman of the Board, succeeding E. C. Plummer, deceased. Admiral H. I. Cone (United States Navy, retired), Atlantic coast, was appointed for a term of 6 years from June 9, 1928, succeeding Admiral W. S. Benson (United States Navy, retired); term to expire June 8, 1934. Albert H. Denton, interior, was appointed January 4, 1928, to serve the unexpired term of 6 years from June 9, 1927, succeeding W. S. Hill, resigned; term to expire June 8, 1933. Jefferson Myers, Pacific coast, was appointed June 15, 1926, succeeding B. E. Haney, resigned, for the term expiring June 8, 1931; reappointed on June 3, 1931, during recess of Congress, for a term of 6 years from June 9, 1931, which reappointment was confirmed December 18, 1931; term to expire June 8, 1937. R. K. Smith, Gulf coast, was appointed October 14, 1926, under a recess appointment, to succeed J. H. Walsh, resigned; reappointed December 17, 1926; term expired June 8, 1929; reappointed May 28, 1929, for a term of 6 years from June 9, 1929; term to expire June 8, 1935.

On July 1, 1932, Public No. 212, Seventy-second Congress, cited as the 'Economy Act', became law. This act reorganized the Shipping Board, reducing

the membership from 7 to 3, 1 commissioner to be appointed from the States touching the Atlantic Ocean or a navigable river directly tributary thereto, 1 from the States touching the Pacific Ocean and 1 from the States touching the Gulf of Mexico.

The act also fixed the term of office at 3 years instead of 6 as under the Merchant Marine Act, 1920; the terms of the first commissioners appointed under Public No. 212, Seventy-second Congress, to be for 1, 2, and 3 years respectively, the commissioners appointed thereunder to hold office until their successors should be appointed and qualified. The act also provided that the Shipping Board as constituted on the date of its enactment should continue to function until the date or reorganization of the Board pursuant to the provisions of the act; consequently the Shipping Board as outlined above, T. V. O'Connor, chairman, S. S. Sandberg, vice chairman, and Commissioners Cone, Denton, Myers, and Smith, continued to function until August 1, 1932.

On July 30, 1932, the President of the United States reorganized the Shipping Board in accordance with the provisions of Public No. 212, Seventy-second Congress. The Shipping Board, as reorganized, was composed of the following members: T. V. O'Connor, Atlantic coast, chairman, for a term of 3 years from June 30, 1932; S. S. Sandberg, Pacific coast, for a term of 2 years from June 30, 1932, and Rear Admiral H. I. Cone (U. S. Navy, retired), Gulf coast, for a term of 1 year from June 30, 1932. The newly appointed members of the Shipping Board, as reorganized, took the oath of office on August 1, 1932. Commissioner Sandberg was elected vice chairman of the Board on August 3, 1932. The nominations of the three commissioners were submitted by the President to the Senate on January 3, 1933. As no action was taken by the Senate on these nominations, the re-

cess appointments automatically terminated with the adjournment of the Seventy-second Congress on March 4, 1933.

On March 15, 1933, the President forwarded to the Senate the nominations of Rear Admiral H. I. Cone (U. S. Navy, retired), of Florida, Capt. David W. Todd (U. S. Navy, retired), of New York, and Capt. Gatewood S. Lincoln (U. S. Navy, retired), of California, to be commissioners, and by letter designated Admiral Cone chairman of the board.

On March 20, 1933, the Senate confirmed the nominations and the President on that date made the following appointments: Rear Admiral H. I. Cone (U. S. Navy, retired), of Florida, for the Gulf coast, for a term of 3 years from June 30, 1932, Capt. Gatewood S. Lincoln (U. S. Navy, retired), of California, for the Pacific coast, for a term of 2 years from June 30, 1932, and Capt. David W. Todd (U. S. Navy, retired), of New York, for the Atlantic coast, for a period of 1 year from June 30, 1932. Commissioner Todd was elected vice chairman of the Board on March 20, 1933.

Although Commissioner Todd's term of office expired at midnight June 29, 1933, he continued to function under the provisions of Public No. 212, no successor having been appointed and qualified.

The Shipping Board at the close of business June 30, 1933, was composed of the following: Rear Admiral H. I. Cone (U. S. Navy, retired), chairman, Capt. D. W. Todd (U. S. Navy, retired), vice chairman, and Capt. Gatewood S. Lincoln (U. S. Navy, retired), commissioner."

APPENDIX F.

Quotations from this Court's Opinions.

In *Humphrey's Executor* v. *United States*, 295 U. S. 602, at page 624, this Court, referring to a similar regulatory body (the Federal Trade Commission), said:

> "The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.' *Illinois Central R. Co.* v. *Interstate Commerce Comm'n*, 206 U. S. 441, 454; *Standard Oil Co.* v. *United States*, 283 U. S. 235, 238-239."

In *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U. S. 474, this Court said (at pp. 480 and 481):

> "The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. * * * In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect."

In *United States* v. *B. & O. R. Co.*, 293 U. S. 454, this Court said (at pp. 462-463):

> "The railroads contend that to support the order

certain basic findings are essential; that these were not made; and that, hence, the order is void. * * * But its finding to that effect is essential to the existence of authority to promulgate the rule; and as Congress has made affirmative orders of the Commission subject to judicial review, *The Chicago Junction Case*, 264 U. S. 258, 263-265, the order may be set aside unless it appears that the basic finding was made. *Florida* v. *United States*, 282 U. S. 194."

In *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, this Court said:

"This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454" (p. 504).

"Every change of a rate schedule, either voluntary or involuntary, is a disruption *pro tanto* of the rate structure theretofore prevailing. Plainly such a disruption without more is sufficient reason for prohibiting a change. * * * There is not a fact to indicate that the rates so reduced will be less than compensatory or that capacity for service to the public will be impaired or put in jeopardy" (p. 507).

"The schedules are to be congealed as they exist, because if not congealed they will be fluid, fluidity is change, and change has the potency, if not the promise, of disturbance" (p. 508).

"The point of the decision is not that present rates are sound, but that they must be maintained, even if unsound, for fear of a rate war which might spread beyond control. The danger is illusory" (p. 509).

"One gains at places the impression that the

Commission looked upon the proposed reduction as something more than a disruptive tendency; * * * The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, 86; *Florida* v. *United States,* 282 U. S. 194, 215" (pp. 510-511).

In *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, this Court said:

"The President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary. The Congress left the matter to the President without standard or rule, to be dealt with as he pleased. The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy" (p. 418).

"The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute" (p. 420).

"* * * The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to

complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

The Court has had frequent occasion to refer to these limitations and to review the course of congressional action. At the very outset, amid the disturbances due to war in Europe, when the national safety was imperiled and our neutrality was disregarded, the Congress passed a series of acts, as a part of which the President was authorized, in stated circumstances, to lay and revoke embargoes, to give permits for the exportation of arms and military stores, to remit and discontinue the restraints and prohibitions imposed by acts suspending commercial intercourse with certain countries, and to permit or interdict the entrance into waters of the United States of armed vessels belonging to foreign nations. These early acts were not the subject of judicial decision and, apart from that, they afford no adequate basis for a conclusion that the Congress assumed that it possessed

an unqualified power of delegation. They were inspired by the vexations of American commerce through the hostile enterprises of the belligerent powers, they were directed to the effective execution of policies repeatedly declared by the Congress, and they confided to the President, for the purposes and under the conditions stated, an authority which was cognate to the conduct by him of the foreign relations of the Government" (pp. 421-422).

"* * * The Court referred with approval to the distinction pointed out by the Supreme Court of Ohio in *Cincinnati, W. & Z. R. Co.* v. *Commissioners,* 1 Ohio St. 88, between 'the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law."

Applying that principle, authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed, have constantly been sustained. Moreover, the Congress may not only give such authorization to determine specific facts but may establish primary standards, devolving upon others the duty to carry out the declared legislative policy, that is, as Chief Justice Marshall expressed it, 'to fill up the details' under the general provisions made by the legislature. *Wayman* v. *Southard,* 10 Wheat. 1, 43" (p. 426).

"There is another objection to the validity of the prohibition laid down by the Executive Order under §9(c). The Executive Order contains no finding, no statement of the grounds of the President's action in enacting the prohibition. Both §9(c) and the Executive Order are in notable contrast with historic practice (as shown by many statutes and proclamations we have cited in the margin) by which declarations of policy are made by the Con-

gress and delegations are within the framework of that policy and have relation to facts and conditions to be found and stated by the President in the appropriate exercise of the delegated authority. If it could be said that from the four corners of the statute any possible inference could be drawn of particular circumstances or conditions which were to govern the exercise of the authority conferred, the President could not act validly without having regard to those circumstances and conditions. And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual? The point is pertinent in relation to the first section of the National Industrial Recovery Act. We have said that the first section is but a general introduction, that it declares no policy and defines no standard with respect to the transportation which is the subject of §9(c). But if from the extremely broad description contained in that section and the widely different matters to which the section refers, it were possible to derive a statement of prerequisites to the President's action under §9(c), it would still be necessary for the President to comply with those conditions and to show that compliance as the ground of his prohibition. To hold that he is free to select as he chooses from the many and various objects generally described in the first section, and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power.

We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presump-

tions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown. * * *

We see no escape from the conclusion that the Executive Orders of July 11, 1933, and July 14, 1933, and the Regulations issued by the Secretary of the Interior thereunder, are without constitutional authority" (pp. 431-433).

In *United States* v. *Northern Pacific Railway Co.*, 242 U. S. 190, 193, this Court held that a penalty of $100.00 a day under Section 20 of the Act to regulate commerce was sufficient to make the Statute a penal statute to be strictly construed.

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, this Court said (at p. 414):

"The statute provides that any violation of any order of the President issued under §9(c) shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both. We think that these penalties would attach to each violation, and in this view the plaintiffs were entitled to invoke the equitable jurisdiction to restrain enforcement, if the statute and the executive orders were found to be invalid. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620, 621; *Terrace* v. *Thompson*, 263 U. S. 197, 214-216; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 499, 500."

See also *Ex parte Young*, 209 U. S. 123.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 307

ISBRANDTSEN-MOLLER CO., INC., APPELLANT

v.

THE UNITED STATES OF AMERICA ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 47) is reported in 14 F. Supp. 407.

JURISDICTION

The decree of the District Court was entered May 22, 1936 (R. 58). The petition for appeal (R. 59) was filed and allowed (R. 71) the same day. Probable jurisdiction was noted by this Court on October 12, 1936.

Jurisdiction of this Court is invoked under Section 31 of the Shipping Act, 1916, c. 451, September 7, 1916, 39 Stat. 738 (U. S. C., Tit. 46, Sec. 830), Section 208 of the Judicial Code (U. S. C., Tit. 28, Sec. 46), and the Act of October 22, 1913, c. 32, 38 Stat. 219 (U. S. C., Tit. 28, Secs. 43, 44, 45, and 47).

QUESTIONS PRESENTED

Appellant seeks to enjoin the enforcement of an order issued by the Secretary of Commerce which required appellant to file certain information with respect to rates charged for the transportation of freight in foreign commerce. In issuing the order, the Secretary exercised statutory authority originally conferred upon the United States Shipping Board by Section 21 of the Shipping Act, 1916, c. 451, 39 Stat. 736 (hereinafter referred to as the Shipping Act). By Section 12 of Executive Order 6166, promulgated June 10, 1933, pursuant to the provisions of Title IV of the Legislative Appropriation Act of June 30, 1932, 47 Stat. 414, as amended, the United States Shipping Board was abolished and the functions of that body transferred to the Department of Commerce.

The principal questions presented by the appeal are:

1. Whether the order issued by the Secretary was one the issuance of which was within the statutory authority of the Shipping Board under the provisions of the Shipping Act.

2. Whether the order issued by the Secretary amounted to an attempted illegal search and seizure.

3. Whether the order issued by the Secretary was arbitrary and unreasonable.

4. Whether Title IV of the Legislative Appropriation Act of June 30, 1932, as amended, authorized the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce.

5. Whether the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce was subsequently ratified by Congress.

6. Whether Title IV improperly delegated legislative power to the President.

7. Whether Title IV was unconstitutional if, as appellees contend, it authorized the transfer of quasi-legislative and quasi-judicial functions to an executive agency.

STATUTES INVOLVED

The pertinent provisions of the Shipping Act, c. 451, 39 Stat. 736 (U. S. C., Tit. 46, Sec. 820), are printed in the appendix, *infra*, pp. 92–102.

Title IV of the Act of June 30, 1932, c. 314, 47 Stat. 414, as amended by c. 212, 47 Stat. 1517 (U. S. C., Tit. 5, Secs. 124–132), also appears in the appendix, *infra*, pp. 88–92.

STATEMENT

This is an appeal from a decree of a specially constituted three judge District Court for the Southern District of New York dismissing a bill of complaint which sought a preliminary and a permanent injunction restraining the enforcement of an order issued by the Secretary of Commerce on November 18, 1935 (R. 58–71).

The bill of complaint was filed by appellant, a corporation organized under the laws of the State of New York and engaged in the operation of steamships in foreign commerce, on January 3, 1936 (R. 3–16). Appellant named as defendants the United States, the Department of Commerce, the Shipping Board Bureau of the Department of Commerce, Daniel C. Roper, individually and as Secretary of Commerce, James C. Peacock, individually and as Director of the Shipping Board Bureau, and Lamar Hardy, United States Attorney for the Southern District of New York (R. 3).

The suit was instituted under Section 31 of the Shipping Act, 39 Stat. 738 (U. S. C., Tit. 46, Sec. 830), which provides that the venue and procedure in suits brought to enjoin an order of the Shipping Board shall be the same as in similar suits in regard to orders of the Interstate Commerce Commission; Section 208 of the Judicial Code (U. S. C., Tit. 28, Sec. 46); and the Act of October 22, 1913, c. 32, 38 Stat. 219 (U. S. C., Tit. 28, Secs. 43, 44, 45, and 47), which provides that the venue of a

suit brought to set aside an order of the Interstate Commerce Commission shall be in the judicial district in which the petitioner has its principal office.

The complaint alleged five causes of action (R. 3–16). For the first cause of action it was alleged that: The Secretary of Commerce, acting under the Shipping Act, issued an order on November 18, 1935, requiring appellant to file with the United States Shipping Board Bureau of the Department of Commerce by December 16, 1935, information concerning specific rates which it had charged during the period from September 1, 1935, to November 12, 1935, for the transportation of property, with certain exceptions, from points in the United States to all points in foreign countries (R. 5–6). It was alleged that the Secretary had no legal authority to issue the order because Executive Order 6166, which abolished the Shipping Board and transferred its functions to the Department of Commerce, was not authorized by Title IV (R. 7–9); and Executive Order 6166 was also alleged to be invalid because it was not preceded by adequate hearings and was not based upon adequate findings of fact (R. 10). It was further alleged that if Title IV had purported to authorize the transfer of the functions of the Shipping Board to the Department of Commerce, it would be unconstitutional as a violation of the principle of separation of powers and because it improperly delegated legislative power to the President (R. 9–10).

Appellant alleged that it had exhausted its administrative remedies (R. 6–7, 10), that the enforcement of the order of the Secretary would cause irreparable injury to its business because the information required would be revealed to its competitors (R. 10); and that its legal remedy was inadequate because the penalties prescribed by Section 21 of the Shipping Act for the violation of the order would preclude it from raising its constitutional objections in a suit brought to enforce the order (R. 10–11).

The allegations of the second cause of action may be summarized as follows: That the Secretary of Commerce had transferred his duties and functions under the Shipping Act to defendant Peacock, as Director of the Shipping Board Bureau of the Department of Commerce (R. 12); that defendant Peacock was Chairman of the Board of Trustees and President of the United States Merchant Fleet Corporation, a private steamship corporation owning or controlling steamships operating in competition with appellant, and controls steamships whose operators are members of conferences or groups of steamship companies combined by contract to fix rates and further a shipping monopoly (R. 12); that all the stock of the Merchant Fleet Corporation is owned by the defendants and their interests are therefore inconsistent with the proper exercise of the regulatory and quasi-judicial functions vested by Congress in the Shipping Board (R. 13); and that the exercise of such powers by

the defendants constitutes a violation of the principle of separation of powers, and of the due process clause of the Fifth Amendment (R. 13).

The allegations of the third cause of action may be summarized as follows: That the order of the Secretary was not issued for a public purpose authorized by Congress, but to promote a shipping monopoly of appellant's competitors and to require appellant either to join a conference or shipping monopoly or suffer injury to its business from the disclosure of its rates to its competitors (R. 14); and that any provisions of law purporting to authorize the issuance of the order of the Secretary for such purposes would violate the Fourth and Fifth Amendments to the Constitution (R. 14).

The allegations of the fourth cause of action may be summarized as follows: That the order of the Secretary constituted an unjust discrimination against appellant in that it required appellant to file the actual rates charged by it on particular goods between named ports, whereas the only order issued to its competitors required merely the filing of general rate schedules which are not always observed (R. 15), and that the order was also discriminatory in that it was issued under Section 21 of the Shipping Act, violations of which carry a heavy penalty, whereas the order issued to appellant's competitors was not issued under that section and carried no penalties for non-observance (R. 15).

The allegations of the fifth cause of action were apparently intended to show a basis for equitable relief (R. 15-16).

At a hearing on January 10, 1936 (R. 17), the District Court, upon the unopposed application of appellant, issued an order for a hearing before a three-judge district court (R. 19-20). On January 21, 1936, the United States, Daniel C. Roper, and Lamar Hardy filed notice of motion to dismiss the bill on the ground that it failed to state a cause of action in equity (R. 20). On the same day the Department of Commerce, the Shipping Board Bureau of that Department, and James C. Peacock filed notice of special appearance and motion to quash service of summons upon them and to dismiss the bill as to them for want of proper jurisdiction and venue (R. 21). Appellant's motion for an interlocutory injunction and defendants' motions to dismiss were heard on February 15, 1936.

On April 8, 1936, the court rendered an opinion in which it held that appellant was not entitled to an interlocutory injunction, and that the bill did not state a cause of action and should be dismissed (R. 47-57). On May 22, 1936, the court entered its final decree, denying an injunction, dismissing the bill as to the Department of Commerce, the Shipping Board Bureau, and James C. Peacock

on the ground that they were not proper parties to the suit, and dismissing the bill as to the other appellees on the ground that it did not state facts sufficient to constitute a cause of action (R. 58–59). On the same day appellant filed its petition for appeal (R. 59–60) together with an assignment of errors (R. 61–71) and an order allowing appeal was entered (R. 71).

The appellant does not urge as error the action of the District Court in dismissing the bill as to the Department of Commerce, the Shipping Board Bureau, and James C. Peacock (appellant's brief, p. 2).

Subsequent to these proceedings there has been enacted the Act of June 29, 1936, commonly known as the Merchant Marine Act, 1936 (c. 858, 49 Stat. 1986), which created a commission to be known as the United States Maritime Commission and transferred the functions of the Shipping Board Bureau of the Department of Commerce to that Commission. By General Order No. 2, dated October 23, 1936, the United States Maritime Commission, pursuant to authority conferred by Section 204 (b) of the Merchant Marine Act, 1936, ordered that all orders and determinations issued by the Department of Commerce, in the exercise of functions, powers, and duties transferred to the commission by the Merchant Marine Act, 1936, and which were in effect at the time of that transfer

should continue in effect until modified, terminated, superseded, or repealed by this Commission or by operation of law.

SUMMARY OF ARGUMENT

The legal questions involved in this case fall logically into two groups: (1) Those which relate to whether the Secretary's order would have been valid if it had been issued by the Shipping Board; and (2) those which relate to whether Congress authorized the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce, and if it did, whether that authorization was a proper exercise of the constitutional powers of Congress.

So far as relates to the first group of questions, the appellees contend that the order issued by the Secretary was clearly authorized by Section 21 of the Shipping Act, and that the allegations of the bill of complaint show, on their face that the order was not unreasonable or arbitrary, and that it neither violates the prohibition of the Fourth Amendment against unreasonable searches and seizures, nor otherwise invades appellant's constitutional rights.

The second group of questions has in part ceased to be of importance in this case because of a development which has taken place since the de-

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General Order No. 2 was published in The Federal Register, No. [illegible], October 25, 1936, p. 1917.

cision below. On June 29, 1936, the Merchant Marine Act, 1936, c. 858, 49 Stat. 1986, became effective. That Act created the United States Maritime Commission and transferred to it the functions of the Shipping Board Bureau of the Department of Commerce. The language of this Act constituted a recognition and approval by Congress of the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce.

This ratification of the action of the President in transferring the functions of the Shipping Board to the Department of Commerce makes it unnecessary to consider appellant's contention that Title IV of the Legislative Appropriation Act of June 30, 1932, did not authorize the President's action. Appellant continues, however, to urge that contention, and consequently this brief will show that Title IV clearly authorized the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce, and that, in any event, even before the passage of the Merchant Marine Act, 1936, Congress had recognized and approved the action of the President.

The passage of the Merchant Marine Act, 1936, also makes it unnecessary to consider appellant's contention that even if Title IV did authorize the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce, the President's action was nevertheless invalid because Title IV was an improper delegation of legislative

power. The scope of the authority originally conferred upon the President by Title IV has ceased to be material, because Congress has now recognized and adopted his action in transferring the functions of the Shipping Board to the Department of Commerce. In any event, appellant's contention is without foundation because an analysis of Title IV shows that it did not unconstitutionally delegate legislative power to the President.

The fact that Title IV authorizes the delegation of quasi legislative or quasi judicial functions to an executive officer or department does not make the statute unconstitutional. The decision in *Humphrey's Executor* v. *United States*, 295 U. S. 602, does not support the proposition that Congress under the Constitution has no power to delegate quasi-legislative or quasi judicial powers to an executive department. Repeated decisions of this Court show that Congress may constitutionally delegate quasi-legislative and quasi-judicial power to an executive officer or department. Appellant's argument to the contrary is an attempt to engraft upon American constitutional law the novel and anomalous concept of a separate fourth branch of government consisting of independent commissions or bureaus which exercise quasi-judicial and quasi-legislative powers. This is a concept repugnant to long-established and commonly accepted principles of constitutional law and inconsistent with the decisions of this Court.

ARGUMENT

I

THE ORDER OF THE SECRETARY OF COMMERCE WAS AUTHORIZED BY THE SHIPPING ACT AND VIOLATES NO CONSTITUTIONAL RIGHTS OF APPELLANT

A. THE ISSUANCE OF THE ORDER WAS A PROPER EXERCISE OF THE AUTHORITY CONFERRED BY THE SHIPPING ACT

The pertinent provisions of the order of the Secretary follow (R. 5-6):

> *It appearing*, That full and complete information as to the rates and charges for or in connection with the transportation of certain property from continental United States to points in foreign countries by carriers by water in foreign commerce subject to the Shipping Act, 1916, is necessary to the proper administration of the regulatory provisions of said act;
>
> *It appearing further*, That Isbrandtsen-Moller Company, Inc., is a common carrier by water in foreign commerce subject to the Shipping Act, 1916;
>
> *It is ordered*, In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916, that Isbrandtsen-Moller Company, Inc., be, and it is hereby, notified and required to file with the Division of Regulation, United States Shipping Board Bureau, of this Department, at its office in Washington, D. C., on or before December 16, 1935, each port-to-port and tran-shipment rate charged and/or collected by it during the period from September 1, 1935,

to November 12, 1935, both dates inclusive, for the transportation of property, except cargo loaded and carried in bulk without mark or count, from all points in continental United States of America to all points in foreign countries; indicated plainly as to each such rate, the place from and to which it was charged and/or collected, the effective date thereof, and the name, in alphabetic order, of each commodity moving thereunder; showing also each terminal or other charge, privilege or facility, granted or allowed, and any rules or regulations which in any wise changed, affected, or determined any part of any such aforesaid rate, or the value of the service rendered to the consignor or consignee;

The issuance of this order was authorized by Section 21 of the Shipping Act which provides in part as follows (U. S. C., Tit. 46, Sec. 820):

> The board may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, *rate, or charge*, or any memorandum of any facts and transactions appertaining to the business of such carrier or other persons subject to this chapter. Such report, account, record, *rate, charge*, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file

> any report, account, record, *rate, charge,* or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default. [Italics supplied.]

This section is cast in broad terms, and contains no qualifying restrictions. It authorizes the issuance of an order requiring a carrier subject to the Act (and it is conceded that the appellant is such a carrier) to file "any periodical or special report, or any account, record, *rate,* or *charge* * * * appertaining to the business of such carrier."

The purpose for which this authority was conferred is shown by regulatory provisions found elsewhere in the Act. Section 14 prohibits the allowance of rebates by carriers to shippers; the employment of "fighting ships" to destroy competition; the use of unfair methods to induce the patronage of shippers; and the making of discriminatory contracts with shippers on the basis of the volume of freight offered (U. S. C., Tit. 46, Sec. 812). Carriers are required by Section 15 to file with the Board all agreements fixing or regulating rates, giving special rates, accommodations, or privileges. The Board is authorized to disapprove, cancel, or modify any such agreement which it finds to be unjustly discriminatory or in violation of the terms of the Act (U. S. C., Tit. 46, Sec. 814). Section 16 makes it unlawful for any carrier to give any undue or unreasonable preference to any particular person, locality, or traffic. It also makes it

unlawful to allow any person to receive transportation of property at less than the regular rates established and enforced by the carrier (U. S. C., Tit. 46, Sec. 815). The charging or collection of any rate by carriers in foreign commerce which is unjustly discriminatory between shippers or ports, or unjustly prejudical to exporters of the United States as compared with their foreign competitors, is prohibited by Section 17 and the Board is authorized to require the discontinuance of such discriminatory rates (U. S. C., Tit. 46, Sec. 816).[2]

Section 21 was intended to enable the regulatory authority to obtain information which could be used to aid in the enforcement of the regulatory provisions summarized above. The order under attack, far from being a usurpation of authority, was issued for the very purpose contemplated by

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[2] Each of the sections whose provisions are summarized above is applicable to carriers engaged in foreign commerce. Sections 14, 15, and 16 apply to every "common carrier by water." That term is defined by Section 1 (U. S. C., Tit. 46, Sec. 801) to mean "a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port." Section 17 applies to every "common carrier by water in foreign commerce." That term is defined by Section 1 to mean "a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade." It is provided that a cargo boat commonly called an ocean tramp is not a common carrier by water in foreign commerce.

Section 21. It is not necessary to look beyond the face of the statute to see that the information requested by the order would materially assist the Secretary in enforcing the regulatory provisions summarized above. The order itself recites that the information requested "is necessary to the proper administration of the regulatory provisions" of the Act and this statement of purpose is confirmed by the affidavits submitted by the appellees in the court below.[3]

The explicit authorization of Section 21 precludes any argument that the Act by its terms does not authorize the order now under attack. Indeed, of all the arguments advanced by appellant in support of its contention that the order is unauthorized, only one rests in any degree upon the language of the Act, and that contention is so flimsy that it does not require extended discussion. The appellant urges that Section 21 was intended "merely

[3] See Record, pp. 37–44. The affidavits summarize the regulatory duties imposed upon the Secretary by the Shipping Act. It is explicitly stated that one of the purposes for which the order was issued was to determine "whether or not the complainant was in fact maintaining a schedule of rates which were applicable on equal terms to all shippers or whether the complainant was charging different rates to different shippers for transportation of the same classification of freight" (R. 40).

The affidavits also contain explanatory statements with respect to the policies of the Department of Commerce. These statements do not purport to explain the reasons for the issuance of the order under attack. See pp. 24–25, *infra*.

to grant to the Board subpoena power for production of records, reports, information, etc." to be exercised in hearings upon complaints concerning violations of the Shipping Act (appellant's brief, p. 29). A complete answer to this contention is found in the fact that Section 27 of the Shipping Act explicitly authorizes the Shipping Board to issue subpoenas to compel the attendance of witnesses and the production of books, papers, and documents in hearings held to determine alleged violations of the Act (U. S. C., Tit. 46, Sec. 826). Congress would not have enacted Section 27 if it had shared appellant's views as to the meaning of Section 21. Elementary canons of statutory construction prohibit the adoption of a construction of Section 21 which artificially restricts and limits the clear import of its terms so as to make the section merely repetitious of Section 27.

The remaining contentions which appellant makes in support of its position that the order was not authorized by the Shipping Act do not rest upon the language of the Act but rather upon pure assumptions, entirely without foundation, as to the supposed purpose of the order and as to the motives which it is alleged prompted the Secretary to make it. So far as these contentions rest upon assumptions as to the purpose of the order, they are refuted by the provisions of the Act, by the plain terms of the order, and by the affidavits submitted by the appellees in the court below; so far as these

contentions rest upon assertions and conjectures as to the motives of the Secretary, they are unwarranted in fact and, in any event, furnish no basis for the relief which appellant seeks.

The argument upon which appellant appears largely to rely is that the order is an illegal attempt "to regulate or stabilize freight rates in foreign commerce" (appellant's brief, pp. 27–31).[4] This contention finds no support in the terms of the order, which does not purport to control or regulate rates in any way, but merely requires the appellant to file certain information with respect to rates which it has charged in a limited period in the past. If the contention has any basis whatsoever, it must be found in facts and circumstances extraneous to the order which are strong enough to overcome the clear purport of its terms. No such facts or circumstances exist or are alleged.

Appellant assumes that the necessary effect of the Secretary's order must be to regulate and stabilize freight rates. This is an assumption which finds no support in the order, in the vague and general allegations of the complaint, or in appel-

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[4] A part of appellant's brief is devoted to proving that the Secretary of Commerce had no general power to prescribe freight rates in foreign commerce (appellant's brief, pp. 28–29). This is beside the point because the order is not an attempt to exercise any such general authority. It should be noted, however, that although the Shipping Act conferred no general authority to fix rates, Sections 14, 16, and 17 of the Act did prohibit rebates and discriminatory rates and to that extent authorized the regulation of rates.

lant's affidavits. The order does not prevent the appellant from charging any rates which it chooses to charge.[5] To the extent that appellant's freedom to fix its own rates is restricted, that restriction is imposed by other provisions of the Shipping Act such as those which forbid discriminatory practices, and the order now under attack does not attempt to enforce these provisions against appellant. The rates which appellant has charged in the past, and with respect to which it is required to report, were fixed by the appellant by its own volition and without any interference by the Secretary. The fact that the appellant must file these rates and that this information will be made public does not prevent the appellant from fixing and charging other and different rates in the future. In short, if the

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[5] The appellant attempts to support its suggestion that the necessary effect of the order would be to regulate rates by quoting from the opinion of this Court in *Sugar Institute, Inc.*, v. *United States*, 297 U. S. 553 (appellant's brief, p. 27). The passage from the Court's opinion quoted by appellant does not support the suggestion that the necessary effect of filing information with respect to rates is to regulate rates. The appellant ignores the fact that in that case the practice condemned was not the filing of information with respect to prices and terms but "*the steps taken to secure adherence, without deviation, to prices and terms thus announced*", 297 U. S. at p. 601. [Italics supplied.]

The quotation is pertinent, however, in another connection which is not helpful to appellant's case. The quotation shows that the publication of rates tends to discourage discriminatory concessions. Such concessions are prohibited by the Shipping Act and the Secretary's order thus appears to be a reasonable and appropriate incident of his power to enforce that prohibition.

order is enforced, the power of appellant to fix its own rates will be as free and untrammeled as it was on the date when the order was first issued.

The appellant contends also that the order of the Secretary was illegal because it was issued for the purpose of benefiting carriers who belong to certain steamship conferences and of compelling appellant to join such a conference (appellant's brief, pp. 30–31). In making this contention, the appellant completely abandons any attempt to rely upon the language of the Shipping Act or upon the terms of the order, and seeks support in assertions and conjectures as to the Secretary's state of mind at the time the order was made. So far as the bill of complaint is concerned, appellant alleges no facts which support these conjectures and assertions but on the contrary relies upon vague and general allegations which are nothing more than conclusions of fact and law and are entitled to no weight whatsoever.

Putting aside for the moment, however, the question of the truth of these assertions and conjectures, they do not possess the legal relevance which appellant attributes to them. The issuance of the order was clearly authorized by Section 21. The regulatory provisions of the Shipping Act, and the terms of the order, show on their face that the order serves a proper regulatory purpose. This being so, the Secretary's state of mind when he made the order is immaterial. An administrative order authorized by law and designed to serve

a legitimate regulatory purpose should not be enjoined on the basis of assertions and speculations about the subjective state of mind of the officer who issued it. Nor should such an order be invalidated on the sole ground that although the officer who made it remained strictly within the limits of his statutory authority and although the order is otherwise legal, it was prompted by motives whose wisdom might be questionable. This Court has said that it will not consider the motives of an executive officer in performing a discretionary act which lies within the scope of his authority. *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, 184. *Cf. Philadelphia & Trenton R. R. Co.* v. *Stimson*, 14 Pet. 448, 458–459. It has also said that it will not question the validity of reasons stated in an administrative order. *United States* v. *Chemical Foundation*, 272 U. S. 1, 15. *Cf. Highland* v. *Russell Car Co.*, 279 U. S. 253.

But even if appellant's charges were relevant they are unfounded. As has already been pointed out, appellant's assertion that the order was not issued for a public purpose is a legal conclusion unsupported by adequate allegations of fact, and is entitled to no consideration. The bill of complaint alleges no specific acts of the Secretary which indicate that he ever sought to induce appellant to become a member of a steamship conference. There is no allegation of any specific acts of the Secretary intended to injure the appellant

in its business. Even if the appellant were permitted to resort to the affidavit of its president (R. 23–27) to supply the deficiencies of the complaint that affidavit contains no statement of evidence which could indicate any illegal or improper motive of the Secretary.[6] The assertion in the affidavit that the order was issued at the instance of competitors of appellant (R. 24) is entirely consistent with the conclusion that the investigation was undertaken as the result of informal information concerning the trade practices of appellant made to the Secretary.[7]

Despite the contrary assertions of appellant, the affidavits submitted on behalf of the appellees in the court below contain a complete denial of any

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[6] An affidavit filed in support of an application for a preliminary injunction cannot be considered in determining whether the complaint states facts sufficient to constitute a ground for relief. *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, 253.

The statement in the affidavit that the purpose of the investigation was "to benefit" the conference lines falls short of appellant's assertion in the brief that the affidavit shows that the order was issued "only for the purpose of turning over the information" to two of complainant's competitors (appellant's brief, p. 13).

[7] It is clear that if an informal complaint were presented to the Secretary and the complainant did not seek to initiate formal proceedings under Section 22 of the Act with a view to obtaining reparation, the Secretary, on his own initiative, would have the power to conduct an investigation under Section 21 to determine whether appellant was in fact engaging in discriminatory practices forbidden by the Act.

improper purpose (R. 37–44).[8] They confirm the recital of the order that it was issued in aid of the lawful regulatory powers of the Secretary (R. 40) and they negative the inference that it is the design of the Secretary to induce appellant to join any conference, or that it is the purpose of the Secretary to injure appellant in its business. In this connection it should be pointed out that appellant, in its brief, in an attempt to support its charges that the Secretary was actuated by improper motives, misconstrues a number of the allegations found in these affidavits. In addition to specifying the particular reasons which led to the issuance of this order, the affidavits contain general explanatory statements with respect to the activities of the Secretary of Commerce, and the policies followed by the Department of Commerce, in administering the duties originally conferred upon the Shipping Board. Many of these statements were responsive to irrelevant assertions found in the bill of complaint. These general statements do not specify the reasons for the issuance of the order now under attack nor do they support appellant's

[8] For the purpose of the motion to dismiss the affidavits submitted by the appellees below cannot, of course, be used to negative any direct and relevant allegations of the bill of complaint. Inasmuch, however, as the appellant in its brief (see particularly pages 33–40) has attempted to use these affidavits to show that the order was unauthorized and unreasonable, it is appropriate in this brief to explain the meaning of the statements contained in those affidavits and the significance which should be attached to them.

assertion that the Secretary was prompted by evil or improper motives when he made it. They show on their face that they are not capable of the construction which appellant seeks to put upon them.[9]

Appellant's argument rests on certain misconceptions as to the nature of the conferences and the relation of the Secretary thereto. The conference agreements which are attacked as "combinations formed by certain shipowners for a selfish and monopolistic purpose" (appellant's brief, p. 30) are agreements between groups of steamship operators made pursuant to the explicit sanction of Section 15 of the Shipping Act, 1916 (39 Stat. 733, U. S. C., Tit. 46, Sec. 814). That section provided that agreements entered into by carriers subject to the Act for the purpose of regulating rates and trade practices should be filed with the Ship-

[9] For example, in the affidavit of Harry S. Brown it is stated that "the experience of the Government has been that the existence of the conference agreements results in greater stabilization of rates and practices affecting foreign commerce and that shippers are greatly aided thereby in being able to quote prices for future delivery by reason of knowing what the freight rates will probably be in the future" (R. 41). Appellant's brief construes this statement as a specification of one of the grounds upon which the Secretary's order was based (appellant's brief, p. 35). This is neither the purpose nor the meaning of the statement. It was obviously intended to explain why the Secretary, in the exercise of the authority conferred upon him by the Shipping Act, had approved certain conference agreements and was responsive to irrelevant assertions made by appellant with respect to the evils and the illegality of the conference agreements.

ping Board. The Board was authorized to disapprove, cancel, or modify any agreement which it finds to be unjustly discriminatory or unfair "as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States", or to be in violation of the prohibitions contained in the Shipping Act. Such agreements, when approved by the Board, were explicitly excepted from the operation of the antitrust laws. Despite appellant's allegation that the Secretary has a "partisan" interest in such conferences (appellant's brief, p. 30), the record shows clearly that he is concerned only in scrutinizing such agreements to ascertain that they do not violate the Shipping Act and that they do not result in a monopoly which prevents other carriers from engaging in business in competition with the members of those conferences (R. 41).[10]

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[10] It is alleged that "any power of rate regulation in foreign commerce would be inconsistent with the duties of a partisan nature imposed by Congress on the Shipping Board so far as foreign commerce is concerned" (appellant's brief, pp. 29–30). This contention is obviously based upon the unfounded assumption that the Secretary has endeavored to fix rates for the carriage of freight in foreign commerce. The regulatory duties imposed by the Shipping Act are in no way inconsistent with what appellant calls the duties of a "partisan nature." Those "partisan" duties consist of the protection of the proprietary interests of the

Appellant asserts that such conferences seek to drive independent steamship companies out of business or to compel them to join conferences (appellant's brief, p. 30). Activities directed to that end would constitute a clear violation of Sections 14 (39 Stat. 733; 41 Stat. 996; U. S. C., Tit. 46, Sec. 812) and 16 (39 Stat. 734; U. S. C., Tit. 46, Sec. 815) of the Shipping Act. If appellant is injured by such practices, it may file a complaint under Section 22 of the Shipping Act (39 Stat. 736; U. S. C., Tit. 46, Sec. 821), and, after a hearing upon its complaint, it may recover full reparation for the injuries it has sustained. Nowhere in the bill of complaint or in appellant's brief is it stated that appellant has ever filed such a complaint concerning practices of the conference steamship lines. In the absence of the employment of this administrative remedy appellant is not entitled to the judicial relief which it seeks in this case. *U. S.*

United States in a small number of vessels which remain of those acquired during the World War, through the supervision of the private operators by which such vessels have been operated (R. 43–44). While such vessels are operated in competition with steamships operated by foreign companies, every effort is made to avoid competition with vessels operated by citizens of the United States (R. 44). It is apparent that this supervisory authority in no way conflicts with the duty to prevent rate discrimination in violation of the Shipping Act.

It should be noted that these so-called "partisan" duties were part of the functions of the original Shipping Board.

Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474, 486–487.[11]

B. THE ORDER OF THE SECRETARY DOES NOT AMOUNT TO AN ATTEMPTED UNREASONABLE SEARCH AND SEIZURE

The appellant contends that the Secretary's order amounts to an attempted unreasonable search and seizure (appellant's brief, pp. 32–42). The appellees submit that the constitutional prohibition against unreasonable search and seizure has no application in the instant case. As the language of the Fourth Amendment clearly indicates, that prohibition was intended to protect the citizen against search and seizure or compulsory production of his books and papers.[12] The order under attack merely requires appellant to furnish

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[11] The decision of this Court in *Thomsen* v. *Cayser*, 243 U. S. 66, upon which appellant relies to establish the illegality of conference agreements, has no application here (appellant's brief, p. 31). In that case suit was instituted under the Sherman Act by a shipper to recover treble damages for injuries sustained through rate discrimination practiced by a combination of steamship companies in restraint of foreign trade. The combination involved was formed prior to the passage of the Shipping Act, and was not a conference authorized by the provisions of Section 15 of the Shipping Act, 1916, or approved by the Shipping Board.

[12] In *Olmstead* v. *United States*, 277 U. S. 438, the purpose of the Fourth Amendment was described in these words (p. 463):

"The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a *man's house, his person, his papers, and his effects; and to prevent their seizure against his will.*" [Italics supplied.]

certain specified information. The order may be the equivalent of interrogation under oath, but it does not call for the production or inspection of appellant's books or papers. If the order was unauthorized by the Shipping Act it would doubtless be illegal, but its illegality would consist in a lack of statutory authority and not in a violation of the search and seizure provision of the Fourth Amendment. *Olmstead* v. *United States,* 277 U. S. 438. *Cf. Bilokumsky* v. *Tod,* 263 U. S. 149, 155.[13]

Quite apart from this consideration, appellant's argument that the order is an unreasonable search and seizure is without merit. The principal basis for the argument appears to be that there is "no legitimate ground" for the order (appellant's brief, pp. 32–42). This is merely a restatement of

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[13] In *Olmstead* v. *United States*, 277 U. S. 438, this Court held that the tapping of telephone wires which involved no trespass upon property of the defendants, was not a search and seizure within the meaning of the Fourth Amendment. The Court said (p. 466):

"Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure."

Cf. *Bilokumsky* v. *Tod*, 263 U. S. 149, where this Court said (p. 155): "But mere interrogation under oath by a Government official of one lawfully in confinement is not a search and seizure."

the contention that the order was not authorized by the provisions of the Shipping Act. It has been shown on pages 13–28, *supra*, that this contention is groundless and that the order is clearly authorized by the provisions of Section 21 of the Act and is a reasonable and appropriate method of obtaining information to aid in enforcing the valid regulatory provisions contained in other sections of the Act. Cases such as *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, and *Jones* v. *Securities Exchange Commission*, 298 U. S. 1, which relate to investigations undertaken without express statutory authorization, are consequently not in point.

The appellant's suggestion that the order is the kind of sweeping demand for information and for the production and inspection of papers which has been disapproved by this Court in such cases as *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, and *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, is without foundation. In those cases blanket demands were made for the inspection of papers and records irrespective of their relevance and without regard to the existence of statutory authority to regulate the subject matter with respect to which the information was requested.

The order in the instant case is of a different character. It does not call for any production or inspection of appellant's private books and papers, much less for a blanket production or inspection.

It does not require the appellant to disclose trade secrets, the names of its customers, or any other information whose disclosure might injure appellant in its business. It merely requires the appellant to furnish a list of freight rates actually charged over a limited period of time. The issuance of the order was authorized by Section 21 of the Shipping Act and the order relates to matters subject to regulation under that Act.

Even if it is assumed that the Fourth Amendment is applicable in the instant case, an order based upon explicit statutory authorization and requesting particular and limited information germane to matters subject to regulation by the authority issuing the order does not constitute an unreasonable search and seizure. This Court has held that a demand of the Interstate Commerce Commission for the production of documents and the making of reports which are relevant to a subject which lies within its investigative power does not constitute an unreasonable search and seizure. *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 45–46; *Cf. Baltimore & Ohio R. R.* v. *Interstate Commerce Commission,* 221 U. S. 612, 622; *Flint* v. *Stone Tracy Co.,* 220 U. S. 108, 177. In *Baltimore & Ohio R. R.* v. *Interstate Commerce Commission,* the Court sustained an order requiring carriers to make monthly reports under oath, showing the instances where employees subject to the Interstate Commerce Act had been on duty for

a longer period than that allowed by the Act. This Court said (p. 622):

> The order of the Commission is suitably specific and reasonable, and there is not the faintest semblance of an unreasonable search and seizure. The Fourth Amendment has no application.

The order of the Secretary involved in this case is quite as reasonable and specific as the order challenged in *Baltimore & Ohio R. R.* v. *Interstate Commerce Commission* and should be sustained for the reasons stated in the language just quoted.

C. THE ORDER OF THE SECRETARY DOES NOT UNLAWFULLY DISCRIMINATE AGAINST THE APPELLANT

The order of the Secretary is directed to the appellant alone. An order directed to a single carrier is clearly authorized by the provisions of Section 21. That Section contemplates that there may be occasions when its purposes will best be served by requiring information from a particular carrier rather than from all carriers subject to the Act. The exertion of the authority thus conferred and the issuance of an order to a single carrier does not violate the due process clause of the Fifth Amendment. That clause does not require rigid and absolute equality of treatment; it does require that the differences in treatment shall not be arbitrary but shall rest on a reasonable basis.[14] In this case there was a reasonable and proper basis for the Secretary's order.

Although the bill of complaint may be construed as alleging that appellant is the only carrier to whom an order directing the filing of rates actually charged has been issued under Section 21 of the Shipping Act (R. 15), the bill of complaint does not allege that appellant is the only carrier who has been required to file information with respect to its rate schedule. The reason why the order involved in this case was directed only to the appellant is disclosed in the affidavit of Harry S. Brown, Chief of Division of Regulation of United States Shipping Board Bureau, Department of Commerce (R. 40):[15]

> By reason of the fact that all other common carriers engaged in foreign commerce by water have filed all the necessary information by filing their schedules of rates, there has been no necessity to issue an order to them under Section 21 of said Shipping Act, 1916.

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[14] *Cf.* such cases as *Denver* v. *New York Trust Co.*, 229 U. S. 123, 143, and *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79, construing the equal protection clause of the Fourteenth Amendment.

[15] It is conceded that for the purposes of the motion to dismiss, the affidavit of Mr. Brown cannot be used to negative any direct allegations of the bill of complaint. Inasmuch as appellant in its brief, however, has discussed Mr. Brown's affidavit in some detail in an attempt to show that the Secretary's order was improper and unreasonable, reference is made to the affidavit for the purpose of showing that appellant's construction of the statements contained therein is unjustified.

Appellant does not dispute that the other carriers subject to the Act have filed information with respect to their rates.[16] On the contrary it affirmatively appears on the face of the bill of complaint that appellant's competitors have filed information substantially similar to that required by the order under attack. In paragraph 31 of the complaint it is alleged that the order discriminates against the appellant because it requires the appellant "to file actual rates charged by it on particular goods between named ports, whereas the only order issued by the defendants to complainant's competi-

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[16] It appears that section 15 of the Shipping Act has been interpreted as requiring those competitors of appellant which are members of the steamship conference to keep on file with the Secretary not only their regular rates but also any special rates or charges (R. 39).

It should be noted that the statements in the affidavit of Harry S. Brown with respect to the filing of tariffs are not confined to those carriers which are members of conferences but cover all carriers engaged in foreign commerce except appellant (R. 39–40).

The competitors of appellant may also be required to file information from time to time under Section 21 of the Shipping Act. It is significant that although the appellant complains that the Secretary has not issued orders to other carriers under the provisions of Section 21, it does not allege that any of its competitors are engaging in discriminatory practices prohibited by the Act and that the Secretary has improperly refrained from exercising his powers under Section 21 with respect to such competitors. In the absence of such an allegation appellant has no basis for its charge of arbitrary discrimination. *Mackay Telegraph Co.* v. *Little Rock*, 250 U. S. 94, 100; *Lieberman* v. *Van De Carr*, 199 U. S. 552, 563; *Ah Sin* v. *Wittman*, 198 U. S. 500, 507–508.

tors, the said Conference Lines, requires merely the filing of general rate schedules which are not always adhered to and which need not be adhered to under any law or government regulation" (R. 15). The gist of appellant's complaint seems to be not that it has been compelled to disclose, while its competitors have been permitted to remain silent, or that it has been required to disclose one kind of information while its competitors have been permitted to disclose another, but that its competitors have not been compelled to adhere to the rate schedules which they have filed (R. 15). The affidavit of Harry S. Brown, submitted in behalf of appellees, shows that this complaint is unfounded,[17] but assuming for the moment that appellant's assertion is correct, the conclusion that this constitutes illegal discrimination is unwarranted. The order directed the appellant to file schedules of rates which had been charged in the past. The appellant fixed those rates without interference by the Secretary. The complaint does not allege that past deviations by appellant's competitors from the rates filed with the Secretary injured appellant

[17] See particularly record 39–40, where it is stated that the rates and schedules filed by appellant's competitors "were those which were effective September 1, 1935, and were to remain effective until changes were made therein by the respective common carriers, and the respective common carriers, upon making any changes in said schedules, within 30 days of the effectiveness of any such change, are filing notice of the said change with the Secretary of Commerce."

in any way in the past and, in any event, such injury affords no basis for the injunctive relief which appellant now seeks.[18] So far as the future is concerned, enforcement of the Secretary's order will not limit or restrict the right of the appellant to deviate from the rates which are filed. Its freedom of action is certainly no less than that of its competitors and may well be more.[19]

In a situation such as the present where appellant is the only carrier in foreign commerce who has refused to file voluntarily with the Secretary information with respect to its rates, it is not unreasonable or arbitrary for the Secretary to issue an order, pursuant to the provisions of Section 21, which is directed to the appellant alone. The issuance of similar orders to other carriers is unnecessary and would serve no useful purpose. If appellant chooses to place itself in a category different from that of all the other carriers by refusing to voluntarily file information with respect

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[18] If appellant has suffered such an injury, a remedy is provided by the provisions of Section 22 of the Shipping Act, and, as it has been pointed out above, appellant is not entitled to maintain this suit until it has exhausted the administrative remedy provided by that Section.

[19] When a schedule of rates is filed as a part of a conference agreement made pursuant to the provisions of Section 15, it can be modified only with the approval of the Secretary.

See also the affidavit of Harry S. Brown referred to above, where it is stated that all of the carriers engaged in foreign commerce, except appellant, give the Secretary 30 days' notice of any change in their rate schedules (R. 40).

to its rates, it cannot object if the Secretary accords it somewhat different treatment. The allegations of the bill of complaint fail to substantiate appellant's contention that the order involves a difference in treatment which is arbitrary or unreasonable or violates appellant's constitutional rights.

The refusal of the Secretary to accede to appellant's insistence that any rate information filed by it be kept secret provides no evidence of arbitrary discrimination against appellant. The bill of complaint does not allege that appellant is not entitled to inspect the rate information filed by other carriers. In fact all rate schedules filed by other carriers are given full publicity and may be inspected by appellant at any time (R. 39). The Shipping Act does not require the Secretary to treat as confidential any data received by him in the exercise of his investigative power. In the absence of such direction it is not to be presumed that Congress intended that such information should be kept in secrecy. This conclusion is strengthened by the fact that in Section 20 Congress did provide that no carrier shall disclose certain confidential information.[20]

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[20] Section 20 provides that no carrier shall disclose confidential information concerning the kind, quality, consignee, or routing of any property delivered to it for transportation, where such information might be used to the detriment of the shipper or the consignee, or which might disclose his business transactions to his competitors. It requires also

II

CONGRESS AUTHORIZED AND SUBSEQUENTLY RATIFIED AND APPROVED THE ABOLITION OF THE SHIPPING BOARD AND THE TRANSFER OF ITS FUNCTIONS TO THE DEPARTMENT OF COMMERCE

The appellant contends that even if it is assumed that the Shipping Board, acting pursuant to the provisions of the Shipping Act, might properly have issued the order involved in the instant case, the Secretary of Commerce had no legal authority to do so because Executive Order 6166 which abolished the Shipping Board and transferred its functions to the Department of Commerce was never authorized by Congress. This argument rests on the premise that Title IV, under which the executive order was made, did not authorize the reorganization of an administrative board or commission like the Shipping Board. If there ever was a time when this contention possessed merit, that time has passed, because by the Act of June 29, 1936, c. 858, 49 Stat. 1986, known as the Merchant Marine Act, 1936, Congress recognized and ratified the abolition of the Shipping Board and the transfer of its functions to the Secretary of Commerce by the executive order in question. See pp. 52–53, *infra*.

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that no carrier shall disclose such information if it might be used to the detriment of any carrier. The section does not intimate that all information shall be kept in secrecy by the Shipping Board (U. S. C., Tit. 46, Sec. 819).

In view of this fact, the intent of Congress when it enacted Title IV of the Legislative Appropriation Act of June 30, 1932, has ceased to be of paramount importance and appellant's contentions with respect to that intent have now merely an academic interest. The appellant, however, in disregard of the Merchant Marine Act, 1936, continues to press its contentions with unabated vigor. The merits of these arguments will therefore now be briefly considered.

A. TITLE IV AUTHORIZED THE ABOLITION OF THE SHIPPING BOARD AND THE TRANSFER OF ITS FUNCTIONS TO THE DEPARTMENT OF COMMERCE

Title IV was enacted pursuant to the declared policy of Congress to reduce expenditures and to increase efficiency in government by coordinating executive and administrative agencies.[21] Section 403 of the Act, which confers the authority exercised by the President in issuing Executive Order 6166, provides in part as follows:

> SEC. 403. Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by Executive order—

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[21] The declaration of policy is found in Section 401 of Title IV. See appendix, pp. 88–89, *infra*.

> (a) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;
>
> (b) Consolidate the functions vested in any executive agency; or
>
> (c) Abolish the whole or any part of any executive agency and/or the functions thereof; and
>
> (d) Designate and fix the name and functions of any consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof.

The issue raised by appellant's contention is whether the term "executive agency" used in Section 403 covers such an agency as the Shipping Board. Section 402 defines the term "executive agency" as follows:

> When used in this title, the term "executive agency" means any *commission, independent establishment, board, bureau,* division, service, or office in the executive branch of the Government and, except as provided in section 403, includes the executive departments. [Italics supplied.]

The intent of Congress is primarily to be determined from the words which it has used. *Thompson* v. *United States,* 246 U. S. 547, 551. *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 46–47. The language of Section 402 is wide in scope and unambiguous

in import. Any one of the terms "commission", "independent establishment", or "board", taken alone, aptly and accurately describes the Shipping Board. Unless some unexpressed but implied limitation is to be read into the words of Section 402, they are broad enough to include the Shipping Board within their scope.[22]

If doubt were possible as to whether the language of Section 402 was intended to cover such an agency as the Shipping Board, that doubt would be removed by the legislative history of Title IV. When the statute was first enacted in 1932 it did not authorize the abolition of such an agency as the Shipping Board; Section 406 expressly provided that the President should have no authority to abolish agencies created by statute. *When the Act was amended in 1933, this prohibition was omitted.*[23] The change in the language of the stat-

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[22] The wide scope intended for Section 402 is also indicated by Section 401 which directed the President to investigate "*all executive and administrative agencies of the Government*" and to "determine what changes therein are necessary." [Italics supplied.] There is no qualifying language in this section to indicate that any administrative or executive body was to be excepted.

[23] The 1933 amendment also made a significant change in the definition of "executive agency." In its original form Section 402 distinguished between "*executive agency*" and "*independent executive agency*", the latter words being defined as covering "any executive agency not under the jurisdiction or control of any executive department." By abandoning this distinction between executive agencies and *independent* executive agencies and including *independent*

ute must be taken as an indication of a change in congressional intent. *Cf. Brewster* v. *Gage*, 280 U. S. 327, 337; *Johnson* v. *United States*, 225 U. S. 405, 415; *Crawford* v. *Burke*, 195 U. S. 176, 190. The omission from the statute of the limitation originally contained in Section 406 creates a presumption that the purpose expressed in that limitation was abandoned. See *Pirie* v. *Chicago Title and Trust Co.*, 182 U. S. 438, 448; *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 537.

Support for the view that Congress intended the amended statute to authorize the abolition or transfer of the functions of agencies such as the Shipping Board is found in the debates which preceded the passage of the amendment. The following significant colloquy with respect to the scope of Section 402 took place in the Senate (Cong. Rec., Vol. 76, Pt. 4, p. 3538):

> Mr. La Follette. I should like to ask the Senator two questions concerning the amendment. One is with regard to section 402, as to whether or not the Senator interprets that language to include the Federal Trade Commission, the General Accounting Office, and the Interstate Commerce Commission.

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establishments within the scope of the term "executive agency" the 1933 amendment showed a clear intent to extend the meaning of the term "executive agency" to cover independent agencies not normally subject to exclusive executive control.

> Mr. BYRNES. Under the definition of "Executive agencies" it would include all of the commissions and departments of the Government except the executive departments.

It is also significant that statements were made in the debates which show that the amendment was intended to confer wider authority on the President than that conferred by the original Act because it was believed that extension of authority was necessary if the purposes of the Act were to be accomplished.[24]

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[24] For example, Representative Ludlow stated (Cong. Rec., Vol. 76, Pt. 5, p. 4603):

> The order given to President Hoover was no such proposal as the one now before us. It did not grant him authority to abolish one solitary governmental agency of any kind. About all his plan amounted to, therefore, and about all it could amount to, was to play solitaire with the bureaus and and commissions, moving them from one place to another, regrouping and rearranging them; but it did not abolish a bureau, fire a bureaucrat, or save a dollar. The House wisely followed the advice of Colonel Roop, the Director of the Budget, and put the matter over until the Congress could vest in the President broader powers that would enable him to do the job as it should be done.
>
> The result of a further consideration of the problem by the Congress is the proposition now before us which gives to the President-to-be plenary powers to reorganize the Government, stopping only short of the power to abolish entire departments, with certain reservations which will enable Congress, by the two-thirds required to override a veto, to defeat any reorganization plan the President may present pursuant to the terms of the act. My only objection to the plan is that it does not go quite far enough. I would give the President power also to abolish departments.

Appellant insists that the qualifying phrase "in the executive branch of the Government" excludes the Shipping Board from the scope of Section 402 because the Board was authorized to perform certain quasi-judicial and quasi-legislative duties and hence could not be regarded as being in the executive branch of the government (appellant's brief, p. 42). Appellant seeks to support this artificial and strained interpretation of Section 402 by citing *Humphrey's Executor* v. *United States,* 295 U. S. 602 (appellant's brief, pp. 42, 44). That decision has no application in the instant case. In that case this Court held that a congressional restriction on the presidential power of removal, which was invalid in the case of an official like a postmaster, was constitutional as respects a member of the Federal Trade Commission.[25]

Assuming for the moment that the Federal Trade Commission and the Shipping Board are similar in all respects, the decision in *Humphrey's*

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[25] The Court stated (295 U. S. 602, 631–632):

"The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute."

Executor v. *United States,* 295 U. S. 602, does not support the proposition that because an agency is not subject to exclusive executive control as respects the power of removal it can never be regarded as a part of the executive branch of the government, or that when Congress uses the words "any commission, independent establishment, board, bureau * * * in the executive branch of the Government" it must be presumed to have intended to exclude from their scope all agencies not subject to such exclusive executive control.[26] Long ago this Court in *Kendall* v. *United States,* 12 Pet. 524, 610, pointed out that an officer in the executive department of the government may in some respects be subject to the control of the legislature:

> The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. *But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President.* Such a principle, we apprehend, is not, and certainly cannot be claimed by the President. There are cer-

[26] The fact that Congress expressly included *independent establishments* in the definition of the words "executive agency" indicates that Congress intended Title IV to cover agencies such as the Federal Trade Commission which are not normally subject to exclusive executive control.

> tain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; *and in such cases, the duty and responsibility grow out of, and are subject to the control of the law, and not to the direction of the President.* [Italics supplied.]

Nor does the fact that an agency or an officer may perform certain quasi-judicial or quasi-legislative functions mean that the agency or officer can never be regarded or described as a part of the executive branch of the government.[27] The Secretary of Agriculture, for example, performs certain quasi-judicial and quasi-legislative duties pursuant

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[27] It is true that in *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628, 630, this Court referred to the Federal Trade Commission as "an agency" of the legislative and judicial departments. It would appear, however, that this language was intended to describe the character which the Commission assumes when it discharges its quasi-legislative and quasi-judicial duties, and that it was not intended to commit this Court to the view that the Federal Trade Commission could never, under any circumstances or for any purpose, be described as falling within the executive branch of the government. It may be said that when an executive officer exercises quasi-legislative power properly delegated to him by Congress he is acting as an agency of Congress, but that would not preclude description of the officer as a member of the executive department of the government.

to the provisions of the Packers and Stockyards Act and the Grain Futures Act, and in connection with the administration of the forest reserves. See *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *United States* v. *Grimaud*, 220 U. S. 506. The duty imposed upon the Secretary of Labor by the Act of June 30, 1936, c. 881, 49 Stat. 2036, of determining minimum wages to be paid by government contractors is a quasi-judicial or quasi-legislative duty. The same officer is required by the Act of March 3, 1931, c. 411, 46 Stat. 1494, as amended, to determine the prevailing wage rate in a community in which public works are being constructed for the purpose of fixing the wages to be paid on those works—a duty which is also quasi-judicial or quasi-legislative in character. The Commissioner of Patents performs certain quasi-judicial and quasi-legislative functions. The Secretary of the Interior performs similar duties in connection with the administration of the public lands. The Rivers and Harbors Act of 1899 (c. 425, 30 Stat. 1151) conferred certain quasi-legislative and quasi-judicial powers upon the Secretary of War in connection with the legalization of obstructions in navigable streams. (See *Union Bridge Co.* v. *United States*, 204 U. S. 364.)

It has never been suggested, either before or after the decision in *Humphrey's Executor* v. *United States*, 295 U. S. 602, that the officers re-

ferred to above are not members of the executive branch of the government.[28]

The words "in the executive branch of the Government" used in Section 402 were not intended to describe merely agencies and officers subject exclusively to executive control and all of whose duties are purely executive in nature; on the contrary, the words were used in a generic sense to describe all agencies and officers except those which may properly be described as belonging either to the legislative or the judicial branch of the government. The Shipping Board could hardly be described as belonging to both the judicial and legislative branches of the government, and to describe it as belonging exclusively to one or the other of those branches produces a result which is patently incongruous. Indeed, appellant stops short of contending that the Shipping Board can properly be described as belonging exclusively either to the legislative or judicial branches of the government. It seems to suggest, however, that the historic theory that the government provided by the Constitution consists of three branches, the executive, the legislative, and the judicial, is incorrect, or at least incomplete, and that there is a fourth and different

[28] It should be noted that in *Morgan* v. *United States*, 298 U. S. 468, 480, decided after *Humphrey's Executor* v. *United States*, 295 U. S. 602, this Court stated that when the Secretary of Agriculture, pursuant to authority conferred upon him by the Packers and Stockyards Act, acts to fix the rates charged by market agencies, he acts in a "quasi-judicial" capacity.

branch, separate and distinct from the other three, which can only be aptly described by the use of such compound adjectives as quasi-legislative and quasi-judicial. This hybrid creature which the appellant evokes for the purpose of defeating the manifest intent of Congress, as expressed in Section 402, is unknown to the Constitution and repugnant to long established and commonly accepted theories as to the nature of the federal government. There are only three branches of that government, the legislative, the judicial, and the executive.[29] The Shipping Board was obviously not a part of the judicial or the legislative branches of the government; it follows that it was a part of the executive branch.[30] There is no escape from this conclusion. It may be true that because of

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[29] See the discussion of the doctrine of separation of powers in The Federalist, No. 47. See also the statements of the doctrine contained in *Kilbourn* v. *Thompson*, 103 U. S. 168, 190; *Myers* v. *United States*, 272 U. S. 52, 116; *Williams* v. *United States*, 289 U. S. 553, 581; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629–630.

This is not to say that the words "quasi-judicial" or "quasi-legislative" may not properly be used to describe duties discharged by officers or agencies of the federal government. The point is that there is no fourth division of the government consisting of those officers and agencies which discharge such "quasi-judicial" or "quasi-legislative" duties and the mere fact that an officer or an agency discharges such duties is no basis for asserting that the officer or agency can never be described as belonging to the executive branch of the government.

[30] *Cf. Springer* v. *Philippine Islands*, 277 U. S. 189, 202–203.

certain functions and duties of the Shipping Board the power of the President to remove members of the Board was not exclusive but was subject to restriction and control by Congress, but that circumstance does not affect the position of the Board in the fundamental framework of the federal government. Appellant's contention to the contrary does violence to the expressed intent of Congress and seeks to engraft upon American constitutional law an arbitrary and anomalous doctrine which should be decisively rejected.

Appellant also contends that Section 306 of Title III of the Legislative Appropriation Act of June 30, 1932, indicated a congressional intent to exclude the Shipping Board from the scope of Section 402 (appellant's brief, p. 45). Section 306 of Title III reduced the number of members of the Shipping Board from seven to three, prescribed their term of office, and provided that all laws relating to the Board should remain in full force and effect. The appellant asserts that by these provisions Congress itself "reorganized the Shipping Board and provided for its permanent continuance on an 'economy basis'; and did not delegate to the President any power or duty whatever with respect to it" (appellant's brief, p. 46).

This contention may be summarily disposed of by the observation that when Section 306 of Title III was enacted, Section 206 of Title IV expressly withheld from the President the authority to

abolish or transfer the functions of such an agency as the Shipping Board. It has been explained above that it was the amendment of Title IV in 1933 which first gave to the President the authority to reorganize the Shipping Board. The clear and unequivocal language with which Congress in 1933 conferred this authority upon the President cannot be explained away or limited by doubtful inferences drawn from Section 306 which was adopted in 1932. The later expression of legislative intent must control. The repeal of Section 206 in 1933 removed the only statutory barrier to the reorganization of the Shipping Board. It is unnecessary to consider whether Congress intended to repeal Section 306, because that section by its terms never purported to provide for the permanent existence of the Shipping Board or to qualify or limit in any way the power to reorganize and to consolidate in the interests of economy and efficiency, which was explicitly conferred upon the President by other sections of the statute.[31]

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[31] It may be suggested that the enactment of the Intercoastal Shipping Act, 1933 (c. 199, 47 Stat. 1425), indicated a congressional intent to preserve the Shipping Board. That statute enlarged the regulatory powers of the Shipping Board over intercoastal commerce. It is significant that although this statute was enacted at the same session of Congress as the amendment to Title IV, Congress did not insert in either statute any language indicating that the amendment was not intended to extend the power of the President to the Shipping Board. The fact that the Intercoastal Shipping Act, in enlarging the powers of the Ship-

B. CONGRESS HAS RATIFIED AND APPROVED THE TRANSFER OF THE FUNCTIONS OF THE SHIPPING BOARD TO THE DEPARTMENT OF COMMERCE

It has been shown that Executive Order 6166 was clearly authorized by the provisions of Title IV. Any conclusion which may be reached, however, with respect to the original intent of Congress has ceased to be of controlling importance in this case because Congress in subsequent legislation has approved and ratified the action of the President in abolishing the Shipping Board and transferring its functions to the Department of Commerce.

The latest and most conclusive congressional expression of approval is found in the Act of June 29, 1936, 49 Stat. 1986, known as the Merchant Marine Act, 1936. The statute creates a commission to be known as the United States Maritime Commission, to which are transferred the functions of the Shipping Board Bureau of the Department of Commerce. In Section 204 (a) of the Act it is specifically stated that the functions of the former Shipping Board are "now vested in the Department of Commerce pursuant to Section

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ping Board, mentioned that body by name cannot be construed as an implied expression of intention that the Shipping Board should remain perpetually in existence irrespective of the provisions of Title IV. When the Intercoastal Shipping Act was passed, no action had been taken by the President under Title IV as amended, the Shipping Board was still in existence, and Congress had no basis for determining whether the President would find the Shipping Board to be a proper subject for coordination.

12 of the President's Executive Order 6166."[32] This is a clean-cut recognition and approval of the transfer of the functions of the Shipping Board and precludes any contention that the Secretary's order should now be enjoined because his assumption of the functions of the Shipping Board is without congressional sanction.

The enactment of the Merchant Marine Act was not the first or the only demonstration of congressional approval. Section 407 of Title IV, as amended, required executive orders issued pursuant to its provisions to be transmitted to Congress while in session and provided also that no such

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[32] Section 204 (a) of the Merchant Marine Act, 1936, follows:

"SEC. 204. (a) All the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916, the Merchant Marine Act, 1920, the Merchant Marine Act, 1928, the Intercoastal Shipping Act, 1933, and amendments to those Acts, and now vested in the Department of Commerce pursuant to section 12 of the President's Executive order of June 10, 1933, are hereby transferred to the United States Maritime Commission; * * *."

Section 202 of the same Act provides additional evidence of congressional ratification of Executive Order 6166. That section provides:

"SEC. 202. All money, notes, bonds, mortgages, and securities of every kind, contracts and contract rights, lands, vessels, docks, wharves, piers, and property and interests of every kind, owned by the United States, and now controlled by the Department of Commerce as the successor to the powers and functions of the former United States Shipping Board, by virtue of the President's Executive Order of June 10, 1933, are hereby transferred to the Commission."

order should become effective until the expiration of sixty days after its transmission to Congress, unless Congress should provide for an earlier effective date.[33] Executive Order 6166 was transmitted to Congress on June 10, 1933, while Congress was in session (Cong. Rec., Vol. 77, Pt. 6, pp. 5598, 5706–5708).[34] Thereafter, Congress did not either expressly or by implication disapprove of the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce. The obvious purpose of Section 407 was to give to Congress an opportunity to disapprove an executive order whose provisions Congress deemed unwise. The failure of Congress to take advantage of this opportunity to disapprove of Section 12 of Executive Order 6166, considered by itself and quite apart from other circumstances, is tantamount to an expression of approval.

Appellant suggests that the Act of June 16, 1933, c. 101, 48 Stat. 283, should be regarded as a disaffirmance of Section 12 of Executive Order 6166,

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[33] Section 407, as amended (47 Stat. 414; 47 Stat. 1519; 48 Stat. 16; U. S. C., Tit. 5, Sec. 130), provides:

"EFFECTIVE DATE OF EXECUTIVE ORDER

"SEC. 407. Whenever the President makes an Executive order under the provisions of this title, such Executive order shall be submitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall by law provide for an earlier effective date of such Executive order or orders."

[34] The session ended on June 16, 1933.

because that Act made appropriations for the Shipping Board (appellant's brief, p. 43). The Act does not mention Executive Order 6166 and on its face gives no indication whatever of any intention on the part of Congress to disapprove the order. If Congress intended to disapprove of the Executive Order it is highly improbable that it would have adopted any such equivocal and ambiguous method of expressing that intent. An examination of the background and legislative history of the Act of June 16, 1933, reveals that there is no basis for appellant's suggestion as to the Act's effect. At no time was Executive Order 6166 mentioned in any of the debates or reports on the Act. The appropriation of funds to the Shipping Board on June 16, 1933, six days after the promulgation of Executive Order 6166, is in no way inconsistent with approval of the order. Under Section 407 of Title IV, Executive Order 6166 could not become effective until sixty days after June 10, 1933, unless Congress should set an earlier effective date. During the intervening period the Shipping Board continued to function, and it was not only proper but necessary that appropriations made during that time should be made to the Board, rather than to the Department of Commerce.

Congress also recognized and approved the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce in a

series of appropriation acts. In the Act of April 7, 1934, Congress, in making appropriations for the Department of Commerce, specifically appropriated funds to the Shipping Board Bureau of that Department to carry out the provisions of the Shipping Act, 1916, and the Merchant Marine Acts of 1920 and 1928. In so doing, Congress expressly mentioned Executive Order 6166 as the authority under which such functions were to be performed by that Bureau.[35] The same explicit recognition of the validity of Executive Order 6166 occurred in appropriations made to the Department of Commerce in 1935 and in 1936.[36] It is to

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[35] The Appropriation Act provided in part (c. 104, Title III, 48 Stat. 529, 566):

"UNITED STATES SHIPPING BOARD BUREAU

"Salaries and expenses: To carry out the provisions of the Shipping Act, 1916, as amended, and the Merchant Marine Acts of 1920 and 1928, as amended (U. S. C., title 46, secs. 804, 805, 861–889; Supp. VI, title 46, secs. 891–891x, Act of June 16, 1933, 48 Stat., 298; Executive Order Numbered 6166, June 10, 1933)," * * *.

[36] The Act of March 22, 1935 (c. 39, Title III, 49 Stat. 67, 99) provided:

"UNITED STATES SHIPPING BOARD BUREAU

"Salaries and expenses: To carry out the provisions of the Shipping Act, 1916, as amended, and the Merchant Marine Acts of 1920 and 1928, as amended (U. S. C., title 46, secs. 804, 805, 861–889; Supp. VII, title 46, secs. 891–891x),

be observed that in the Appropriation Act for 1936 Congress added to the duties of the Department of Commerce the administration of the Intercoastal Shipping Act of 1933.

Appellant attempts to discount these appropriation acts on the ground that they merely "casually" mentioned the Executive Order as "a mere matter of recital or citation" (appellant's brief, p. 43). But these statutes cannot be so lightly brushed aside. Whether the Executive Order was referred to casually or otherwise, its mention shows that Congress was aware of the transfer of the functions of the Shipping Board to the Department of Commerce. With that knowledge Congress, not once but several times, appropriated funds to be used by the Department of Commerce in administering the functions formerly performed by the Shipping Board. To suggest, as appellant does, that these repeated appropriations by Con-

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the Act of April 7, 1934 (48 Stat. 566–568), and Executive Order Numbered 6166 (June 10, 1933)," * * *.

The Act of May 15, 1936, c. 405 (49 Stat. 1309, 1345), provided:

"UNITED STATES SHIPPING BOARD BUREAU

"Salaries and expenses: To carry out the provisions of the Shipping Act, 1916, as amended, the Merchant Marine Acts of 1920 and 1928, as amended, the Intercoastal Shipping Act, 1933 (U. S. C., title 46, secs. 741–790, 801–848, 861–889, 891–891x, 911–984); and Executive Order Numbered 6166 (June 10, 1933)," * * *.

gress were mere oversights is to ignore the realities of the situation.[37]

That administrative action taken as a result of misinterpretation of authority may be subsequently ratified by Congress is well established by decisions of this Court. See *Hamilton* v. *Dillin*, 21 Wall. 73, 96–97; *United States* v. *Heinszen & Co.*, 206 U. S. 370, 384; *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690; *Wilson* v. *Shaw*, 204 U. S. 24; *Tiaco* v. *Forbes*, 228 U. S. 549, 556; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, 232; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 427–430; *Mascot Oil Co.* v. *United States*, 282 U. S. 434; *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, 10, 11; *Seattle* v. *Kelleher*, 195 U. S. 351, 359–360; *Hodges* v. *Snyder*, 261 U. S. 600, 602–603; *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 332. In *Tiaco* v. *Forbes*, 228 U. S. 549, 556, the Court said:

> * * * it generally is recognized that in cases like the present, where the act orig-

[37] Appellant's dismissal of these appropriation acts as casual oversights is inconsistent with its contention that the Appropriation Act of June 16, 1933, was a disaffirmance of Section 12 of Executive Order 6166. Apparently appellant believes that although an express reference to Executive Order 6166 and the appropriation of money to be used by the Department of Commerce are too casual to amount to a ratification or recognition of the action of the President in transferring the functions of the Shipping Board to the Department of Commerce, the bare reference to the Shipping Board in the Appropriation Act of June 16, 1933, even though no reference was made to Executive Order 6166, is not too casual to be an express disaffirmance of the executive order.

> inally purports to be done in the name and by the authority of the state, a defect in that authority may be cured by the subsequent adoption of the act.

The principle applied by this Court in *Wilson* v. *Shaw*, 204 U. S. 24, is applicable in the instant case. There suit was instituted by a citizen of the United States to restrain the Secretary of the Treasury from borrowing and paying out money for the construction of the Panama Canal. The petitioner asserted that the United States had acquired no title to the Canal Zone because the statute which authorized the acquisition of the land in question specified that the property was to be secured from the Republic of Colombia, whereas in fact the property upon which the proposed canal was to be built had been acquired from the Republic of Panama by treaty. In affirming the dismissal of the bill this Court held that Congress by subsequent legislation had ratified the action of the President. The Court stated, with reference to the position of the petitioner (p. 32):

> He contends that whatever title the Government has was not acquired as provided in the act of June 28, 1902, by treaty with the Republic of Colombia. A short but sufficient answer is that subsequent ratification is equivalent to original authority. The title to what may be called the Isthmian or Canal Zone, which at the date of the act was in the Republic of Colombia, passed by an act of secession to the newly formed Republic of

> Panama. The latter was recognized as a nation by the President. A treaty with it, ceding the Canal Zone, was duly ratified. 33 Stat. 2234. Congress has passed several acts based upon the title of the United States, among them one to provide a temporary government, 33 Stat. 429; another fixing the status of merchandise coming into the United States from the Canal Zone, 33 Stat. 843; another, prescribing the type of canal, 34 Stat. 611. These show a full ratification by Congress of what has been done by the Executive. Their concurrent action is conclusive upon the courts. We have no supervising control over the political branch of the Government in its action within the limits of the Constitution. *Jones* v. *United States,* 137 U. S. 202, and cases cited in the opinion; *In re Cooper,* 143 U. S. 472, 499, 503.

That such ratifying legislation is applicable and may be given retroactive effect by an appellate court even though enacted after the decision of the court of first instance passing upon the administrative action involved is well settled. *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226; *United States* v. *Schooner Peggy,* 1 Cranch, 103, 110; *Dinsmore* v. *Southern Express Company &c.,* 183 U. S. 115; *Dorchy* v. *Kansas,* 264 U. S. 286; *Steamship Company* v. *Joliffe,* 2 Wall. 450. It should be noted that the ratification here involved is not a bare attempt of the legislature to retroactively create li-

ability for a transaction fully consummated in the past (*Cf. Graham & Foster* v. *Goodcell,* 282 U. S. 409, 429), and that the effect of the ratification is not to impair any vested right of appellant.

III

IN ABOLISHING THE SHIPPING BOARD AND TRANSFERRING ITS FUNCTIONS TO THE DEPARTMENT OF COMMERCE, CONGRESS PROPERLY EXERCISED POWERS CONFERRED UPON IT BY THE CONSTITUTION

A. TITLE IV DID NOT IMPROPERLY DELEGATE LEGISLATIVE POWER TO THE PRESIDENT

In issuing the order now under attack, the Secretary of Commerce exercised authority originally conferred upon the Shipping Board by the Shipping Act. The appellant does not contend that this original delegation of power to the Shipping Board was unconstitutional. If the original delegation to the Shipping Board was proper, a similar delegation to the Secretary of Commerce, made directly by Congress, would have been equally proper because the prohibition against improper delegation of legislative power controls the range of discretion which Congress may permit to its instrumentalities and not the identity of those instrumentalities. It follows that no question of improper delegation of power is *directly* raised in the instant case because appellant apparently concedes that the provisions of the Shipping Act under which the Secretary's order was issued do not violate the doctrine of separation of powers. The

question of delegation of power arises only because the transfer of functions of the Shipping Board to the Department of Commerce was made by an executive order issued by the President pursuant to the provisions of Title IV. If that transfer originally had been made directly by Congress by its own action instead of through the instrumentality of the President, the basis upon which appellant bases its arguments as to delegation of legislative power would not exist. Appellant does not, therefore, complain that it is about to be injured by an order made by an executive officer in the exercise of unlimited and uncontrolled discretion improperly conferred upon him by Congress; its complaint is directed to the question of the constitutionality of the legislation under which the President acted in transferring the functions of the Shipping Board to the Department of Commerce.

The appellant contends that Title IV improperly delegates legislative power to the President, first, because it failed "to define adequately the subject" to which it was addressed, and second, because it "failed to limit the range of the President's discretion over" that subject (appellant's brief, pp. 48–52). Consideration of the subject matter to which Title IV relates and analysis of its provisions show that this contention is without foundation.

Section 401 of Title IV declares that a serious emergency exists by reason of the general economic depression and that it is imperative to reduce dras-

tically governmental expenditures. The section provides that the President "shall investigate the present organization of all executive and administrative agencies of the Government and shall determine what changes therein are necessary to accomplish" the specific purposes which are listed in six subparagraphs.[38]

Section 402, which has been discussed on pages 40–51, *supra,* defines the executive agencies which the President is authorized to reorganize and consolidate. Section 403 provides that whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies or the functions thereof is necessary to accomplish any of the purposes set forth in Section 401, he may by executive order direct such regrouping,

[38] These purposes are:

(a) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;

(b) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;

(c) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purposes;

(d) To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government.

(e) To eliminate overlapping and duplication of effort; and

(f) To segregate regulatory agencies and functions from those of an administrative and executive character.

consolidation, transfer, or abolition. Subparagraph (d) of Section 403 limits the President's power by providing that he shall not have the authority to abolish or transfer an executive department or all the functions thereof. Section 407 requires an executive order issued under Section 403 to be submitted to Congress while in session and provides that the order shall not become effective until the expiration of sixty days after it has been so submitted.

Title IV is intended to authorize the reorganization of all of the executive and administrative agencies of the government. Although that authorization is extended to *all* of those agencies, without exception, the subject matter of the Act is nevertheless limited in character. The power which it confers cannot within the bounds of reason be compared to the unfettered and uncontrolled power to approve codes of fair competition for *all trades and industries in the country* condemned by this Court in *Schechter Corp.* v. *United States,* 295 U. S. 495.[39].

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[39] In that case this Court said "the power conferred" related "to a host of different rates and industries, thus extending the President's discretion to all varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country." 295 U. S. at p. 539.

The contrast is obvious between a statute authorizing the President to prescribe what rules he shall deem advisable for all *trade and industry* and one directing him to investigate and, if necessary, to reorganize and consolidate all executive and administrative agencies of the federal government.

The President's power to deal with the subject matter of Title IV is not unlimited and absolute. By Section 401 *he is required* to investigate all executive and administrative agencies of the government and to determine what changes therein are necessary to accomplish the purposes specified in the six subparagraphs of the section. To the extent that this section makes action by the President mandatory, it cannot be said to permit him to act or not to act as he sees fit, and in this respect it differs materially from the statute held to be unconstitutional by this Court in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388.

The purposes specified in the subparagraphs of Section 401 provide standards to guide the President in exercising the authority conferred on him by Section 403. The standards provided are more detailed and definite than many which have been sustained by this Court: for example, the standard of "public convenience, interest or necessity" set up to guide the Radio Commission in issuing licenses (*Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266, 279, 285); the standard of "purity, quality and fitness for consumption" which the Secretary of the Treasury was directed to apply in connection with the importation of tea (*Buttfield* v. *Stranahan,* 192 U. S. 470, 494); the standard of "public interest" established to guide the Interstate Commerce Commission in the exercise of its power to approve the acquisition of one carrier by another (*New York Central Securities Corp.* v. *United*

States, 287 U. S. 12, 24–25); *cf. Avent* v. *United States,* 266 U. S. 127, 130; *United States* v. *Shreveport Grain and Elevator Co.,* 287 U. S. 77, 85; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 192.

Section 403 required the President, before ordering the consolidation or reorganization in any executive agency, to "find" and "declare" that the consolidation or reorganization was necessary to the accomplishment of the purposes set forth in Section 401. The President made such a finding when he promulgated Executive Order 6166, and the order therefore is not subject to the objection successfully made in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 431, that it "contains no finding, no statement of the grounds of the President's action."[40] Without specifying the grounds on which

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[40] The finding and declaration were contained in the Executive Order and read as follows:

"Whereas section 16 of the act of March 3, 1933 (Public, No. 428, 47 Stat. 1517), provides for reorganizations within the executive branch of the Government; requires the President to investigate and determine what reorganizations are necessary to effectuate the purposes of the statute; and authorizes the President to make such reorganizations by Executive order; and

"Whereas I have investigated the organization of all executive and administrative agencies of the Government and have determined that certain regroupings, consolidations, transfers, and abolitions of executive agencies and functions thereof are necessary to accomplish the purposes of section 16;

"Now, therefore, by virtue of the aforesaid authority, I do hereby order that:" * * *.

its objection rests, the appellant asserts categorically that the President's finding was "completely inadequate" (appellant's brief, p. 52). No basis exists for this assertion. The Executive Order clearly stated that the consolidations, transfers, and abolitions, which it directed were "necessary to accomplish the purposes" of Section 401, and this finding and declaration satisfy the requirements of Section 403.[41]

That Title IV does not improperly delegate legislative power to the President becomes even clearer when the purposes of the statute and the nature of its subject matter are considered. Its purpose was to reorganize, in the interests of economy and efficiency, the administrative and executive agencies of the federal government. It is well known that those agencies are numerous and that they discharge a great variety of duties and functions. The formulation and execution of a plan of con-

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The Executive Order refers to Section 16 of the Act of March 3, 1933, 47 Stat. 1517, because it was that section of the Act of March 3, 1933, which contained the amendment to Title IV. The reference to the purposes of Section 16 clearly includes the purposes specified in Section 401.

[41] If the finding had repeated the statement of purposes found in Section 401, it clearly would have been adequate. See *United States* v. *Curtiss-Wright Export Corp. et al.*, No. 98, October Term, 1936, where the executive order sustained contained a finding stated in the precise words of the statute under which the order was made. The fact that the finding in the instant case refers generally to Title IV instead of repeating the specifications of purpose is not a fatal defect. The adequacy of an executive finding is not to be determined on such a purely formal and artificial basis.

solidation and reorganization necessarily requires detailed knowledge of many intricate questions of fact and careful consideration of equally numerous administrative and executive problems. If, as appellant contends, the Constitution requires Congress to specify by name each of the boards and bureaus and agencies which is to be reorganized, and otherwise to legislate with respect to each detail of the plan of reorganization, it is doubtful whether, as a practical matter, it would ever be possible to consummate a plan of reorganization.[42]

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[42] This point was made in the Congressional discussions of Title IV. Representative Mapes stated (Cong. Rec., Vol. 75, Pt. 8, p. 9264):

"I agree fully with the position of the gentleman from Illinois [Mr. Holaday] that, if we ever have a reorganization of the various departments of the Government really worth while, we must give the President the necessary authority to do the job. The debate on this bill and the action of the House during the last few days are evidence anew of the correctness of that statement."

Representative Ludlow stated (Cong. Rec., Vol. 76, Pt. 5, p. 4603):

"One thing that is absolutely certain is that the Federal Government will never be reorganized adequately and thoroughly except by the delegation of ample authority to the President, as provided in the language of this bill. The history of all similar attempts proves this to be true. Three Presidents of the United States in modern times have ventured into the field of governmental reorganization, each time with disastrous results because in no instance did Congress give to the Executive the authority he must have to perform the task. It was a dream of President Taft, whose well-meant efforts registered absolutely nil. The most far-reaching attempt in that direction was made by President Harding, who chose Walter F. Brown, now the Postmaster

Moreover, the task of working out the details of the plan of a reorganization is one for which the Executive is peculiarly competent. Because of the nature of his duties he is better acquainted than Congress with the details of the operations of many of the administrative and executive agencies of the federal government, and he may obtain additional information with respect to such details by methods which are more direct and less cumbersome than those normally available to Congress.[43]

These considerations lead to the conclusion that in enacting Title IV "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute." *Buttfield* v. *Stranahan*, 192 U. S. 470, 496. *Cf. Hampton*

General, to draft the plan. The problem was studied with extreme pains and care and a report was submitted to Congress, but a thousand special interests and individuals swooped down upon Congress to protest the demobilization of the bureaus, and in the end nothing was done."

[43] *Cf. United States* v. *Curtiss-Wright Export Corp., et al.*, No. 98, October Term, 1936, where this Court upheld the delegation of authority made to the President by the Joint Resolution of Congress of May 28, 1934 (c. 365, 48 Stat. 811). That resolution authorized the President to prohibit the sale of arms to certain countries in South America if he should find that the prohibition would contribute to the reestablishment of peace between those countries. Speaking of the President, this Court said: "Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign governments, and especially is this true in time of war."

& Co. v. *United States*, 276 U. S. 394; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 85. To assert that Title IV improperly delegates legislative power to the President is to embrace the conclusion that the Constitution denies to Congress "the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within the prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply", and this is a conclusion which this Court expressly disapproved in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421.

In considering the question of delegation of legislative power, one other fundamental consideration must be taken into account. Title IV is not a statute which lays down rules of conduct to be generally enforced by the coercive power of the federal government. In this respect the authority conferred by Title IV differs from the coercive legislative power which this Court held had been improperly delegated to the Executive in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, and *Schechter Corp.* v. *United States*, 295 U. S. 495." To para-

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" In *Schechter Corp.* v. *United States*, 295 U. S. 495, this Court described Title I of the National Industrial Recovery Act in these words (p. 529):

"It involves the coercive exercise of the law-making power. The codes of fair competition which the statute attempts to

phrase the language of this Court in *United States* v. *Grimaud,* 220 U. S. 506, 516, Title IV does not declare general rules with reference to the rights of persons and property, nor does it create or regulate obligations and liabilities nor declare what shall be crimes nor fix penalties therefor. The exercise of the powers possessed by executive departments and agencies may doubtless affect the rights and obligations of citizens generally, but the internal organization and administration of those agencies do not, and Title IV relates solely to matters of internal organization and administration. The contrast between the two kinds of statute is illustrated by the two statutes involved in the present case. It cannot be said that any authority conferred by Title IV has been exercised so as to affect the terms and substance of the Secretary's order which appellant attacks. So far as that order operates to affect the rights of appellant, its operation must be justified under the applicable provisions of the Shipping Act. Those provisions au-

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authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes."

In its earlier decision in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, the Court held section 9 (c) of Title I of the National Industrial Recovery Act invalid because it gave "to the President an unlimited authority to determine the policy and to lay down the *prohibition* or not to lay it down, as he may see fit" (p. 415). [Italics supplied.]

thorize the making of administrative rules and orders which may be enforced by the coercive powers of the government, and in this respect the Shipping Act stands in marked contrast to Title IV which merely authorizes changes in the internal organization of administrative agencies. In the present case the only thing affected by Title IV has been the identity of the administrative agency which made the order under attack. If the order had been made by the Shipping Board instead of by the Secretary of Commerce, presumably the appellant could and would have advanced all of the objections which it now makes with respect to the unfairness of the order and the motives which prompted it. The change in the identity of the executive agency which made the order has not injured appellant in any way or affected its rights and obligations.

In the case of a statute such as Title IV, which relates solely to the internal organization of the government, the prohibition against the delegation of legislative power, if it is to be applied at all, is to be applied far less rigorously than in the case of a statute which lays down general rules to be enforced by the coercive power of the government. This is demonstrated by the wide latitude which has been permitted to Congress in delegating authority which does not involve the exercise of its coercive powers. Thus, it is well settled that Congress has a wider power of delegation in legislation

disposing of and regulating public property than in ordinary regulatory legislation. *Butte City Water Co.* v. *Baker,* 196 U. S. 119, 126; *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 474; *United States* v. *Wilbur,* 283 U. S. 414, 419; *United States* v. *Grimaud,* 220 U. S. 506, 516.[45] Similarly, Congress may vest a large measure of discretion in administrative officers in connection with the establishment of fiscal agencies. For example, the acts establishing United States banks left to the directors practically unrestricted power to determine where branches of the banks should be established. See *McCulloch* v. *Maryland,* 4 Wheat. 316, pp. 335–337, 424.[46] See also *First National Bank* v. *Union Trust Co.,* 244 U. S. 416, 427. Likewise, in disposing of property of the United States, Con-

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[45] In *Butte City Water Co.* v. *Baker,* 196 U. S. 119, 126, this Court said:

"The Nation is an owner, and has made Congress the principal agent to dispose of its property. * * * While the disposition of these lands is provided for by Congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. *It is not of a legislative character in the highest sense of the term,* and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands." [Italics supplied.]

[46] In *McCulloch* v. *Maryland,* 4 Wheat. 316, it was contended by counsel for the State of Maryland that the grant of this unrestricted power was improper (4 Wheat. 335–337), but this contention was summarily disposed of by Chief Justice Marshall (4 Wheat. 424).

gress may entrust administrative officers with wide discretion. *Cf. United States* v. *Chemical Foundation,* 272 U. S. 1, 11–12; and see *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288.[47] Another striking example of discretion left to the Executive in carrying out laws which are not of regulatory or coercive nature is found in the statute authorizing the issuance of obligations of the United States. Although the power to borrow money on the credit of the United States is a legislative power, Congress in authorizing the Secretary of the Treasury to borrow money has conferred upon him extremely broad powers. This legislation is collected in Title 31 of U. S. C., Section 752–757. An examination of the legislation shows that the Secretary of the Treasury is left wholly free to determine whether and when to issue any or all of different types of obligations authorized by the statute. In some cases the rate of interest is left entirely to his discretion. In the case of some securities he is given his choice of different schemes of complete or partial tax exemption.

The distinction between exercises of legislative power which are regulatory or coercive in character and those which are not is not fortuitous but

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[47] In *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, the petitioners maintained that the statute involved improperly delegated legislative power to the Tennessee Valley Authority. In sustaining the constitutionality of the particular disposition of property involved in that case, this Court passed over this contention without discussion.

rests upon the fundamental principle which underlies the doctrine of the separation of the governmental powers. The principle is that the liberty and safety of a citizen requires that the same agency of government which enacts laws shall not be entrusted with their enforcement, and that the enforcement agency shall not have the power of enacting laws. Montesquieu, whose influence upon the framers of the Constitution is well known, said that the principle was necessary to liberty, lest "the same monarch or senate should enact tyrannical laws, to enforce them in a tyrannical manner" *Esprit des Lois* (Book 2, Chapter 6). See also Blackstone's *Commentaries,* p. 46; *Federalist,* No. 47; Story, *Constitution of United States,* 4th Edition, Sections 517, 524. When Congress does not authorize the making of general rules to be enforced by the coercive power of the government but merely legislates for the purpose of readjusting the internal organization of government agencies, its action by no stretch of the imagination can be regarded as presenting any danger of tyranny because no coercion or regulation of individuals or of private rights by arbitrary and uncontrolled authority is in any way involved.

In still another respect Title IV differs strikingly from the statutes involved in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Corp.* v. *United States,* 295 U. S. 495. Those statutes conferred wide authority which could be exercised without reference to any subsequent congressional

action. Under Section 407 of Title IV, however, an exercise of the authority conferred by the statute can only become effective after there has been an opportunity for congressional rejection. In considering the legality of an executive order which has been issued pursuant to Title IV and submitted to Congress and not disaffirmed or rejected, it should be remembered that the order is supported not only by the original authorization but also by the subsequent approval of the legislature.[48]

B. THE SCOPE OF THE POWERS ORIGINALLY CONFERRED BY TITLE IV IS NOW IMMATERIAL BECAUSE CONGRESS HAS RECOGNIZED AND RATIFIED THE ACTION OF THE PRESIDENT IN ABOLISHING THE SHIPPING BOARD AND TRANSFERRING ITS FUNCTIONS TO THE DEPARTMENT OF COMMERCE

In the instant case it is no longer necessary to determine whether or not Congress improperly delegated power to the President by the provisions of Title IV, because by subsequent legislation Congress has recognized and ratified the

[48] *Cf.* the English practice of provisional orders, *i. e.*, administrative orders which require parliamentary approval before they become effective or which become effective only if they are submitted to Parliament and not disapproved within the specified time. See, for example, Halsbury's *Statutes of England*, Vol. XII (1930), pp. 749–750, with respect to the issuance of provisional orders by local government boards. See also *Chelmsford Union* v. *The Local Board of Health* (1852), 2 E. & B. 500 n; 118 E. R. 855, and *Bessemer and Co., Ltd.*, v. *Gould* (1912), 107 L. T. R. 298; 23 Cox C. C. 145. See also *The Powers of Public Departments to Make Rules Having the Force of Law*, M. L. Gwyer, 5 Journal of Public Administration 404, 410–413 (1927).

action of the President in abolishing the Shipping Board and transferring its functions to the Department of Commerce. This subsequent legislation has been explained earlier in this brief (pp. 52–58, *supra*), and it has been shown that it can be regarded only as a recognition and ratification of the President's action. If that action was at any time invalid because undertaken pursuant to an improper delegation of authority, the ratification cured that defect. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, *supra*. See also *Mascot Oil Co.* v. *United States*, 282 U. S. 434; *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, 10, 11; *Seattle* v. *Kelleher*, 195 U. S. 351, 359–360; *Hamilton* v. *Dillin*, 21 Wall. 73; *Hodges* v. *Snyder*, 261 U. S. 600, 602–603; *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 332; *Wagner* v. *Baltimore*, 239 U. S. 207, 216, 217; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Kansas City Ry.* v. *Road District*, 266 U. S. 379; *Tiaco* v. *Forbes*, 228 U. S. 549.

Appellees do not contend that Congress has ratified or attempted to ratify its own action in delegating power to the President. What it has ratified is the action of the President in abolishing the Shipping Board and transferring its functions to the Department of Commerce. As a result of that ratification the abolition of the Shipping Board and the transfer of its functions to the Department

of Commerce must now be regarded as if it had been expressly directed by an act of Congress. When the case is viewed in this light, the question of the scope of the power delegated to the President by Title IV ceases to be material.

C. IN AUTHORIZING THE ABOLITION OF THE SHIPPING BOARD AND THE TRANSFER OF ITS FUNCTIONS TO THE DEPARTMENT OF COMMERCE CONGRESS DID NOT VIOLATE THE PRINCIPLE OF SEPARATION OF POWERS

The appellant contends that because the functions of the Shipping Board were of a quasi-judicial and a quasi-legislative character Congress could not transfer those functions to an executive department or officer without violating the doctrine of separation of powers (appellant's brief, p. 48). Appellant's position appears to be that, although the powers in question can properly be delegated, the Constitution permits Congress to delegate them only to a particular kind of officer or agency. This is a constitutional doctrine, novel in conception and startling in its consequences. Hitherto the doctrine of separation of powers has been applied to limit the scope of the authority and discretion which Congress may confer when it delegates power to an administrative body or agency. Appellant now seeks to extend the doctrine so as to limit and control the power of Congress to determine the identity or the personnel of the agency or instrumentality to which, within the prescribed limits, it may delegate power. The attempted extension is unwarranted; if a power can be delegated

at all it can be delegated to any kind of officer or agency which Congress may select.[49]

If, as appellant suggests, Congress cannot delegate quasi-legislative or quasi-judicial power to an executive department or officer, it must, if it wishes to delegate such power at all, create a special commission or bureau for that purpose. Acceptance of this principle would lead inevitably to the creation of a kind of fourth grand division of the federal government consisting solely of these independent commissions or bureaus. This is a radical departure from traditional concepts of the nature of the federal government which finds no support in the language of the Constitution or in the decisions of this Court.

The one decision which appellant cites in support of its contention is *Humphrey's Executor* v. *United*

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[49] The discussion in No. 47 of the Federalist shows that the doctrine as to separation of powers was intended to limit the *nature* and *extent* of the power which might be delegated by one branch of the government to another:

"From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates', or, 'if the power of judging be not separated from the legislative and executive powers', he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." [Italics supplied.]

States, 295 U. S. 602 (appellant's brief, p. 48). That decision did not purport to limit the power of Congress either with respect to the delegation of quasi-legislative and quasi-judicial powers, or otherwise. On the contrary, the effect of that decision was to establish the power of Congress to limit, to some extent, the power of the Executive to remove the members of certain kinds of administrative agencies. Assuming for the moment that the Shipping Board was precisely similar in all respects to the Federal Trade Commission, and that, therefore, the decision in *Humphrey's Executor* v. *United States,* 295 U. S. 602, applied to the Shipping Board, that decision does not support appellant's argument. The principle that Congress has the power to prescribe the terms of the members of the Shipping Board and to specify the grounds upon which they may be removed and that the President can not remove a member except on one of the specified grounds is no premise for the argument that under the Constitution Congress does not have the power to abolish the Shipping Board and transfer its functions to the Department of Commerce.

In numerous instances this Court has approved the exercise of duties calling for the exercise of quasi-legislative and quasi-judicial powers by executive officers of the government. In *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, suit was instituted to set aside a determination of the Secretary of the Interior with respect to a claim to land, rendered

pursuant to a statute which gave him jurisdiction to determine the matter. In denying the relief sought, this Court stated (p. 324):

> Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.

See also *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 108.

In *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, a statute which conferred upon the Secretary of Commerce and Labor and collectors of customs the duties of imposing and collecting certain prescribed penalties from steamship companies for illegally transporting immigrants to the United States was attacked on the ground that the Act conferred judicial powers upon the Secretary.

In disposing of that objection the Court said (p. 338):

> In all cases of penalty or punishment, it is contended, enforcement must depend upon the exertion of judicial power, either by civil or criminal process, since the distinction between judicial and administrative functions cannot be preserved consistently with the recognition of an administrative power to enforce a penalty without resort to judicial authority. But the proposition magnifies the judicial to the detriment of all

> other departments of the Government, disregards many previous adjudications of this court and ignores practices often manifested and hitherto deemed to be free from any possible constitutional question.

After citing previous decisions, the Court stated (p. 339):

> In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

The exercise by executive officers of regulatory powers, similar in nature to those of the Shipping Board, was also approved in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.[50]

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[50] In that case the Court sustained the validity of the Grain Futures Act, which authorized the Secretary of Agriculture to designate "contract markets" upon which trading in grain futures might be conducted. A commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General—all executive officers—was given power to revoke the designation of such contract markets and to suspend the trading privileges of individuals for failure to comply with the requirements of the Act.

Under the Packers and Stockyards Act, whose constitutionality was sustained in *Stafford* v. *Wallace,* 258 U. S. 495, the Secretary of Agriculture exercises quasi-legislative and quasi-judicial powers. That Act provides for the regulation of the business of meat packers and for the supervision and control of stockyards. It constitutes the Secretary of Agriculture a tribunal to hear complaints, to make findings thereon, and to issue orders to compel compliance with the regulatory features of the Act. The Secretary is authorized to determine what stockyards are to be subject to the provisions of the Act. He is given authority to prescribe, upon certain conditions, the rates to be charged by stockyards subject to the Act, and also the rates to be charged by market agencies engaged in business at those stockyards. In *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, this Court approved the exercise by the Secretary of his power to prescribe the rates to be charged by market agencies. See also *Acker* v. *United States,* 298 U. S. 426; *Morgan* v. *United States,* 298 U. S. 468.[51] The exercise of the rate making power of the Secretary with reference to the stockyards companies

[51] In *Morgan* v. *United States,* 298 U. S. 468, this Court said in describing the action of the Secretary in fixing the rates which may be charged by market agencies (p. 480):

"A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character." [Italics supplied.]

was approved in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38. In that case the Court stated (p. 50):

> Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards.

The power to modify or change tariff duties is clearly quasi-legislative in character, yet this Court has held that it may within proper limits be delegated to the President. *Hampton & Co.* v. *United States*, 276 U. S. 394. See also *Butfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Grimaud*, 220 U. S. 506; *Union Bridge Co.* v. *United States*, 204 U. S. 364. It would be possible to cite many other examples of the exercise of quasi-judicial and quasi-legislative powers by purely executive officers. Indeed it has hitherto never been suggested, either with respect to the federal government or the government of the several states, that the doctrine of separation of powers requires that all regulatory powers of a quasi-judicial or a quasi-legislative character be exercised by independent boards or commissions.[52]

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[52] It is interesting to note that in 1812 James Monroe expressed an opinion clearly inconsistent with the notion that quasi-judicial or quasi-legislative powers could be exercised only by an independent board or commission. In opposing the removal of the patent office from the Department of State, he said (2 American State Papers, Misc., p. 192):

The regulatory functions which were performed by the Secretary of Commerce by virtue of his succession to the duties of the Shipping Board differ in no essential respect from those which were exercised by purely executive officers in the cases discussed above. Those decisions provide a conclusive answer to the contention that Congress, in authorizing the transfer made by Section 12 of Executive Order 6166, violated the principle of separation of powers.

"I have always thought that every institution, of what nature soever it might be, ought to be comprised within some one of the Departments of Government, the chief of which only should be responsible to the Chief Executive Magistrate of the nation. The establishment of inferior independent Departments, the heads of which are not, and ought not to be, members of the administration, appears to me to be liable to many serious objections, which will doubtless occur to you."

It is also significant that from an early period the States conferred regulatory powers of a quasi-judicial or quasi-legislative character upon executive officers. For example, New York in 1851 created a Superintendent of Banks who exercised regulatory powers over the banking business. See New York Laws, 1851, c. 164, §§ 1 and 2. In 1859 New York created a Superintendent of Insurance who exercised similar powers with respect to the business of insurance. Laws of New York, 1859, c. 366, §§ 1 and 2. The practice of delegating regulatory powers to commissions rather than to executive officers is of more recent origin. The first state railroad commissions with plenary regulatory powers were created between 1871 and 1875. See Sharfman, *The Interstate Commerce Commission*, Vol. 1, pp. 14–15.

If appellant's contention is pressed to its logical conclusion, the results are startling and far-reaching. Most of the executive departments and officers of the federal government exercise, in one connection or another, powers which may be described as quasi-legislative or quasi-judicial in character. If appellant's contention is correct, the exercise of these powers has been and is unconstitutional. If these powers can be constitutionally exercised only by independent commissions, it will be necessary to create additional and numerous commissions to discharge duties hitherto performed by executive officers and departments. If the already intricate and complex structure of the federal government is to be further complicated by the creation of numerous additional bureaus and commissions and regulatory bodies, it may well be doubted whether reorganization of that structure in the interests of economy and efficiency will ever be possible. The tendency of the complexity of modern life and of the expansion in the duties assumed by the federal government, to encourage or compel an increase in the size of the governmental structure and in the number of its component parts is already a matter of public concern. This tendency should not be accelerated by the acceptance of an arbitrary and artificial gloss upon the Constitution.

CONCLUSION

For the foregoing reasons the decree of the District Court of the United States for the Southern District of New York should be affirmed.

Respectfully submitted.

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JANUARY 1937.

APPENDIX

Title IV of the Act of June 30, 1932, c. 314, 47 Stat. 414, as amended by the Act of March 3, 1933, c. 212, 47 Stat. 1517, and the Act of March 20, 1933, c. 3, 48 Stat. 16 (U. S. C., Title 5, secs. 124–132) provides:

TITLE IV. REORGANIZATION OF EXECUTIVE DEPARTMENTS

DECLARATION OF STANDARD

SEC. 401. The Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accomplished in great measure by proceeding immediately under the provisions of this title.

Accordingly, the President shall investigate the present organization of all executive and administrative agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes:

(a) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;

(b) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;

(c) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purposes;

(d) To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government;

(e) To eliminate overlapping and duplication of effort; and

(f) To segregate regulatory agencies and functions from those of an administrative and executive character.

DEFINITION OF EXECUTIVE AGENCY

SEC. 402. When used in this title, the term "executive agency" means any commission, independent establishment, board, bureau, division, service, or office in the executive branch of the Government and, except as provided in section 403, includes the executive departments.

POWER OF PRESIDENT

SEC. 403. Whenever the President, after investigation, shall find and declare that any regrouping, consolidation, transfer, or abolition of any executive agency or agencies and/or the functions thereof is necessary to accomplish any of the purposes set forth in section 401 of this title, he may by Executive order—

(a) Transfer the whole or any part of any executive agency and/or the functions thereof to the jurisdiction and control of any other executive agency;

(b) Consolidate the functions vested in any executive agency; or

(c) Abolish the whole or any part of any executive agency and/or the functions thereof; and

(d) Designate and fix the name and functions of any consolidated activity or executive agency and the title, powers, and duties of its executive head; except that the President shall not have authority under this title to abolish or transfer an executive department and/or all the functions thereof.

SEC. 404. The President's order directing any transfer, consolidation, or elimination under the provisions of this title shall also make provision for the transfer or other disposition of the records, property (including office equipment), and personnel, affected by such transfer, consolidation, or elimination. In any case of a transfer or consolidation under the provisions of this title, the President's order shall also make provision for the transfer of such unexpended balances of appropriations available for use in connection with the function or agency transferred or consolidated, as he deems necessary by reason of the transfer or consolidation, for use in connection with the transferred or consolidated function or for the use of the agency to which the transfer is made or of the agency resulting from such consolidation.

SAVING PROVISIONS

SEC. 405. (a) All orders, rules, regulations, permits, or other privileges made, issued, or granted by or in respect of any executive agency or function transferred or consolidated with any other executive agency or function under the provisions of this title, and in effect at the time of the transfer or consolidation, shall continue in effect to the same extent as if such transfer or consolidation had not occurred, until modified, superseded, or repealed.

(b) No suit, action, or other proceeding lawfully commenced by or against the head of any executive agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of any transfer of authority, power, and duties from one officer or executive agency of the Government to another under the provisions of this title, but the court, on motion or supplemental petition filed at any time within twelve months after such transfer takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the head of the executive agency or other officer of the United States to whom the authority, powers, and duties are transferred.

(c) All laws relating to any executive agency or function transferred or consolidated with any other executive agency or function under the provisions of this title, shall, in so far as such laws are not inapplicable, remain in full force and effect, and shall be administered by the head of the executive agency to which the transfer is made or with which the consolidation is effected.

WINDING UP AFFAIRS OF AGENCIES

SEC. 406. In the case of the elimination of any executive agency or function, the President's order providing for such elimination shall make provision for winding up the affairs of the executive agency eliminated or the affairs of the executive agency with respect to the functions eliminated, as the case may be.

EFFECTIVE DATE OF EXECUTIVE ORDER

SEC. 407. Whenever the President makes an Executive order under the provisions of this title, such Executive order shall be submitted to the Congress while in session and shall not become effective until after the expiration of sixty calendar days after such transmission, unless Congress shall by law provide for an earlier effective date of such Executive order or orders.

APPROPRIATIONS IMPOUNDED

SEC. 408. The appropriations or portions of appropriations unexpended by reason of the operation of this title shall not be used for any purpose but shall be impounded and returned to the Treasury.

TERMINATION OF POWER

SEC. 409. No Executive order issued by the President in pursuance of the provisions of section 403 of this title shall become effective unless transmitted to the Congress within two years from the date of the enactment of this Act.

The pertinent provisions of the Shipping Act, 1916 (September 7, 1916, c. 451, 39 Stat. 738, as amended; U. S. C., Title 46, secs. 801, *et seq.*), provide—

Section 801. Terms defined. When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Terri-

tories, or possessions and a foreign country, whether in the import or export trade: *Provided,* That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

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(Sept. 7, 1916, c. 451, § 1, 39 Stat. 738; July 15, 1918, c. 152, § 1, 40 Stat. 900.)

* * * * * *

§ 812. Rebates and discriminations by carriers by water prohibited; use of "fighting ship." No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term

"deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense. (Sept. 7, 1916, c. 451, § 14, 39 Stat. 733; June 5, 1920, c. 250, § 20, 41 Stat. 996.)

§ *813. Determination by board as to violations.* The board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

(1) Has violated any provision of the preceding section, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in the preceding section, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

If the board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the board shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the board certifies that the violation has ceased or such combination, agreement, or understanding has been

terminated. (Sept. 7, 1916, c. 451, § 14a; June 5, 1920, c. 250, § 20, 41 Stat. 996.)

§ 814. Contracts between carriers filed with board. Every common carrier by water, or other person subject to this chapter, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1 to 11, inclusive, and section 15 of chapter 1, of Title 15, Commerce and Trade, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action. (Sept. 7, 1916, c. 451, § 15, 39 Stat. 733.)

§ *815. Discriminatory acts prohibited.* It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the

regular rates then established and enforced on the line of such carrier, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter. (Sept. 7, 1916, c. 451, § 16, 39 Stat. 734.)

§ *816. Discriminatory rates prohibited; supervision by board.* No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice. (Sept. 7, 1916, c. 451, § 17, 39 Stat. 734.)

§ 817. *Carriers to establish, observe, and enforce reasonable rates and regulations.* Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected,

or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice. (Sept. 7, 1916, c. 451, § 18, 39 Stat. 735.)

§ 818. Rates reduced not to be increased without approval of board. Whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the board finds that such proposed increase rests upon changed conditions other than the elimination of said competition. (Sept. 7, 1916, c. 451, § 19, 39 Stat. 735.)

* * * * *

§ 820. Reports by carriers required. The board may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account,

record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment. (Sept. 7, 1916, c. 451, § 21, 39 Stat. 736.)

§ *821. Complaints to board and investigations.* Any person may file with the board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter. (Sept. 7, 1916, c. 451, § 22, 39 Stat. 736.)

* * * * *

§ *826. Attendance of witnesses and production of books and papers.* For the purpose of investigating alleged violations of this chapter, the board may by subpoena compel the attendance of witnesses and the

production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. Subpoenas may be signed by any commissmissioner, and oaths or affirmations may be administered, witnesses examined, and evidence received by any commissioner or examiner, or, under the direction of the board, by any person authorized under the laws of the United States or of any State, Territory, District, or possession thereof to administer oaths. Persons so acting under the direction of the board and witnesses shall, unless employees of the board, be entitled to the same fees and mileage as in the courts of the United States. Obedience to any such subpoena shall, on application by the board be enforced as are orders of the board other than for the payment of money. (Sept. 7, 1916, c. 451, § 27, 39 Stat. 737.)

* * * * *

§ 830. *Venue and procedure in suits to enforce, suspend, or set aside orders.* The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties. (Sept. 7, 1916, c. 451, § 31, 39 Stat. 738.)

§ 831. *Penalty for violation of chapter.* Whoever violates any provision of this chapter, except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by fine of not to exceed $5,000. (Sept. 7, 1916, c. 451, § 32, 39 Stat. 738.)

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 307.—October Term, 1936.

Isbrandtsen-Moller Company, Inc., Appellant, *vs.* The United States of America, et al.	Appeal from the District Court of the United States for the Southern District of New York.

[February 1, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from the final decree of a specially constituted district court of three judges for the Southern District of New York denying an interlocutory injunction and dismissing the appellant's bill for failure to state facts sufficient to constitute a cause of action.[1] The suit was brought to restrain enforcement of an order issued November 18, 1935, by the Secretary of Commerce pursuant to Section 21 of the Shipping Act, 1916,[2] requiring the appellant to file with the Secretary on December 16, 1935, a copy or summary of its books and records for the period September 1 to November 12, 1935, which should show each commodity carried from the United States to a foreign country, with point of shipment, point of destination, and rate charged or collected, the effective date of the rate, and trans-shipment and terminal charges and

[1] 14 F. Supp. 407.

[2] Act of Sept. 7, 1916, c. 451, Sec. 21, 39 Stat. 728, 736, 46 U. S. C. Sec. 820. The suit was instituted under Sec. 31 of the Shipping Act, 39 Stat. 738, 46 U. S. C. Sec. 830, whereby the venue and procedure in suits to restrain enforcement of an order of the Shipping Board is made the same as in similar suits respecting orders of the Interstate Commerce Commission. (Judicial Code, Sec. 208, 28 U. S. C. 46, and the Act of October 22, 1913, c. 32, 38 Stat. 219, 28 U. S. C. Secs. 43, 44, 45, and 47, whereby the venue of a suit brought to set aside an order of the Interstate Commerce Commission is the judicial district in which the petitioner has its principal office.) The complainant named and attempted to serve as defendants, in addition to the United States, the Department of Commerce, the Shipping Board Bureau of the Department of Commerce, Daniel C. Roper, individually and as Secretary of Commerce, James C. Peacock, individually and as Director of the Shipping Board Bureau, and Lamar Hardy, United States Attorney for the Southern District of New York. The suit was dismissed as to many of these defendants for want of service or for want of proper joinder as defendants but the action was maintainable as the United States is, by the statutes, made the proper party defendant in such cases. No point is here made as to the action below dismissing defendants from the cause.

rules affecting rates or value of the service rendered. The order recites that it appears full information as to rates in connection with transportation of certain property from the United States to foreign countries by carriers by water in foreign commerce subject to the Shipping Act 1916 is necessary to the proper administration of the regulatory provisions of the act and that the appellant is engaged in such transportation.

The complaint sets forth five causes of action. The first is that the order is invalid because Congress did not intend by the Legislative Appropriation Act of 1932 [3] to authorize the President to abolish the Shipping Board and transfer its functions to an executive officer such as the Secretary of Commerce and that if Congress did so intend the Act is unconstitutional as attempting to make the head of an executive department also a judicial officer and a legislative officer of the United States and in failing to set up an adequate declaration of policy or standard of action, and, further, that the President promulgated the order of transfer without adequate hearings or findings of fact on which to base it.

The second cause of action is that the Secretary's order is invalid as in substance the attempt of a competitor to regulate or stabilize the appellant's rates and to compel it to charge rates fixed by a shipping monopoly of which appellant's competitor is a member. The charge is that before the order was issued the Secretary had transferred all his Shipping Board functions to one Peacock who was president of a private shipping corporation (The United States Merchant Fleet Corporation) which was actively operating vessels in competition with those of appellant and was a member of a conference or shipping combination whose interests were opposed to those of appellant, which is an independent or non-conference operator; and that the order had been issued for the financial benefit of the competitor. The further allegation is that the constitutional separation of powers between legislative, judicial, and executive branches and the Fifth Amendment of the Constitution forbid the exercise of regulatory or quasi-judicial functions such as were entrusted to the United States Shipping Board by persons or agencies having the interests described and require that the Secretary's order be held for naught.

[3] Act of June 30, 1932, c. 314, 47 Stat. 382, 413.

The third cause of action is that the order was issued not for a public purpose authorized by Congress but in furtherance of a concerted plan to compel the appellant, an independent non-conference carrier, either to join a conference or shipping monopoly, or else suffer damage by disclosure to competitors of current business records showing rates charged and commodities transported. The Secretary's order is alleged to have been issued to promote and foster a monopoly of appellant's competitors.

The fourth cause of action is that the order is an unjust discrimination against appellant which is forbidden by the Fifth Amendment because it requires appellant to file a record of actual transactions whereas the Secretary requires appellant's competitors, the conference lines or members of the shipping combination, merely to file general rate schedules for the future which are not always observed and need not be observed. Further, that the order issued under Section 21 entails penalties for disobedience whereas orders issued by the Secretary to appellant's competitors were not issued under Section 21 or any other section of the act, carried no penalties for non-observance, and called only for information which those competitors were already required by law to file under Section 15 of the Shipping Act of 1916 [4] because of their having joined in a conference or shipping combination.

The fifth cause of action is that the order should be enjoined because the Secretary rejected appellant's offer to file records on condition that they would not be communicated to appellant's competitors to the damage of appellant and because the Secretary stated his purpose was to turn the records over to the public which would result in fostering unfair competition and ruin appellant's business. It is charged that the appellant cannot comply with the order without prejudice or losing its equitable, legal, and constitutional rights.

An injunction affidavit was filed by the appellant and two reply affidavits by the United States. We find it unnecessary to consider them as we are of opinion that the decree dismissing the bill must be affirmed.

The grounds of complaint fall into two general classes. Upon the assumption that the powers and duties of the Shipping Board were effectively transferred to the Secretary of Commerce the

[4] Act of September 7, 1916, § 15, c. 451, 39 Stat. 728, 733, 46 U. S. C. § 814.

claim is that the order was beyond the statutory authority conferred by the Shipping Act, amounted to an illegal search and seizure, and was invalid because arbitrary and unreasonable. But, in addition, it is asserted that transfer of the board's powers and duties to the Secretary was unauthorized by action of Congress and, if so authorized, was in violation of the Constitution.

First. The order is plainly within the terms of Section 21 of the Shipping Act, 1916, which provides:

"The board may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default."

The appellant suggests that the section grants power merely to subpoena records, reports, and information, to be exercised only in hearings upon complaints of violation of the act. This view ignores the fact that Section 27 explicitly authorizes the issuance of subpoenas,[5] including subpoenas *duces tecum*, for hearings upon alleged violations. It is inconceivable that this is mere tautology. The purpose of Section 21 is not far to seek. Other sections forbid allowance of rebates, require the filing of agreements fixing or regulating rates, granting special rates, accommodations or privileges, which may be disapproved, cancelled or modified if the board finds them unjustly discriminatory or violative of the act, prohibit undue or unreasonable preferences or the cutting of established rates and unjust discrimination between shippers or ports.[6] To enable it to perform its functions the board may well need such information as that which the section gives it power to demand. Indeed the order recites that in this instance such information is so required.

Despite its recitals of legitimate purpose, the order, so the complaint alleges, sprang from illegal motives, namely, to regulate

[5] 46 U. S. C. 826.

[6] 46 U. S. C. 812-816.

and stabilize freight rates for the benefit of carriers belonging to steamship conferences, to compel appellant to join a conference, and to create a monopoly in trans-oceanic shipping.

Aside from the principle that if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it,[7] the allegations of the complaint are mere conclusions unsupported by any facts pleaded and are, therefore, insufficient.[8]

The argument that the order amounts to an unreasonable search and seizure, forbidden by the Fourth Amendment, is answered by the fact that it does not call for the production or inspection of any of appellant's books or papers.[9]

The complaint asserts the appellant is the only carrier which has been required, pursuant to Section 21, to file a record of rates actually charged. The section, however, plainly authorizes the making of such an order directed to a single carrier. Nevertheless, the appellant charges such action is unreasonable and arbitrary and violates the Fifth Amendment. The bill itself discloses the conference carriers have filed schedules of their rates and the act requires that if any contract for a change of those rates is made the new rates may be charged only after the board has approved the agreement.[10] The gravamen of the complaint does not appear to be that the appellant is required to supply information not furnished by the conference lines or different information from that which the conference lines file with the Secretary, but that the conference lines are not compelled to adhere to the rates named in their schedules. There is, however, no showing that this circumstance injures the appellant. The data called for related to rates charged in the past,—rates fixed by the appellant without constraint; and the bill makes no charge that compliance with the order will in any wise restrict the appellant's freedom to

[7] *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, 184. *Philadelphia and Trenton R. R. Co.* v. *Stimpson*, 14 Pet. 448, 458, 459; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14, 15.

[8] *Moore* v. *Greene*, 19 How. 69, 72; *St. Louis &c. Ry. Co.* v. *Johnston*, 133 U. S. 566, 577; *Garrett* v. *Louisville & N. R. Co.*, 235 U. S. 308, 313; *Nortz* v. *United States*, 294 U. S. 317, 324-5; *Einstein* v. *Schnebly*, 89 Fed. 540, 548.

[9] *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 45, 46. Compare *Olmstead* v. *United States*, 277 U. S. 438, 463; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612.

[10] 46 U. S. C. 814.

deviate from those past rates in the future. The case made by the bill fails to exhibit discrimination in fact as between appellant and its competitors, much less arbitrary and unjustifiable discrimination.

Second. It is earnestly contended that Title IV of the legislative appropriation act of June 30, 1932, as amended,[11] did not authorize the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce by executive order. Title III of the act reorganized the Shipping Board and it is said that Congress would not have taken this action had it intended to include the Shipping Board within the scope of Section 402 of the act, which defines executive agencies the President may abolish or whose functions he may transfer as "any commission, board, bureau, division, service, or office in the executive branch of the government." That this is true is attested by the fact that Section 406 withheld from the President the authority to abolish or transfer the functions of the Shipping Board. But when the act was amended March 3, 1933,[12] the prohibition was omitted and the phrase "independent establishment" was added to the enumeration of executive agencies in Section 402. After these changes were made the President, by Executive Order dated June 10, 1933, made the transfer. As required by the act of June 30, 1932, he transmitted a copy of the order to the Congress which adjourned a few days after its receipt. Whatever doubt may be entertained as to the intent of Congress that the Shipping Board should be subject to transfer by the President, and, if so, whether the order lay before Congress the requisite number of days to satisfy the statutory mandate, Congress appears to have recognized the validity of the transfer and ratified the President's action by the appropriation acts of April 7, 1934,[13] March 22, 1935,[14] and May 15, 1936,[15] all of which make appropriations to the Department of Commerce for salaries and expenses to carry out the provisions of the shipping act as amended and refer to the executive order. The appellant insists that these references were casual and are not to be taken as ratifying the President's action. We need not stop to consider the argument since, by the Merchant Marine Act of 1936,[16] Section

[11] 47 Stat. 413; 47 Stat. 1517.
[12] 47 Stat. 1517.
[13] C. 104, Title III, 48 Stat. 529, 566.
[14] C. 39, Title III, 49 Stat. 67, 99.
[15] C. 405, 49 Stat. 1309, 1345.
[16] June 29, 1936, c. 858, 49 Stat. 1985.

204 (a), the functions of the former Shipping Board are referred to as "now vested in the Department of Commerce pursuant to Section 12 of the President's Executive Order No. 6166."

It remains to deal with the contentions that Congress lacked the power either to transfer or to ratify the transfer of the duties of the Shipping Board to the Secretary of Commerce by delegating to the President authority so to do by executive order, subject to the approval of Congress, and that the President, in exercising the power delegated to him, exceeded his authority because he acted without notice and hearing and failed in the order adequately to specify the grounds for his action. We find it unnecessary to decide the questions sought to be raised in this connection. On June 29, 1936, Congress adopted the Merchant Marine Act. By Section 204(a) of that statute it was provided:

"All the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916, . . . and amendments, . . . and now vested in the Department of Commerce pursuant to Section 12 of the President's Executive Order of June 10, 1933, are hereby transferred to the United States Maritime Commission" . . .

The Commission is created by the Act. By Section 204 (b) it is authorized to adopt all necessary rules and regulations to carry out the powers, duties, and functions vested in it by the act. October 21, 1936, after organization, the Commission promulgated an order (General Order No. 2)[17] in which it declared:

". . . all orders, . . . which have been issued or authorized by . . . the Department of Commerce, in the exercise of the functions, powers, and duties transferred to this Commission by the Merchant Marine Act, 1936, and which are in effect at the time of such transfer, shall continue in effect, insofar as not in conflict with said Act, until modified, terminated, superseded, or repealed by this Commission or by operation of law; . . ."

We are of opinion that the Act of 1936 and the Commission's order render moot the constitutional questions sought to be raised by the appellant even though we assume, without deciding, that the Secretary of Commerce had no power to issue the order of November 18, 1935. That order was administrative in character. It determined no rights and prescribed no duties of the appellant as an ocean carrier. It demanded the filing of data. No

[17] The Federal Register, No. 159, October 23, 1936, p. 1917.

notice or hearing was prerequisite to its issue. It was still *in fieri* when the United States Maritime Commission came into existence. By virtue of the action of that commission it is continued in force and the appellant is commanded to obey it. The appellant concedes that if the order was within the constitutional and statutory powers of the Shipping Board, and had been made by that board, there could be no question of its validity. As it has become an outstanding administrative order of a commission having the powers and duties formerly vested in the Shipping Board the appellant is in no position to contend that, as it now affects the appellant, the order is void because issued in the alleged unconstitutional exercise of the powers of the Shipping Board by the Secretary of Commerce.

The decree is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.